

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 77

THE UNITED STATES OF AMERICA, PETITIONER,

v.

PETTY MOTOR COMPANY

No. 78

THE UNITED STATES OF AMERICA, PETITIONER,

v.

MERRILL J. BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL
COMPANY

No. 79

THE UNITED STATES OF AMERICA, PETITIONER,

v.

WILLIAM G. GRIMSDALL, DOING BUSINESS AS GROCER PRINTING
COMPANY

No. 80

THE UNITED STATES OF AMERICA, PETITIONER,

v.

CHARLES F. WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE SHAFT
COMPANY

No. 81

THE UNITED STATES OF AMERICA, PETITIONER,

v.

INDEPENDENT PNEUMATIC TOOL COMPANY

No. 82

THE UNITED STATES OF AMERICA, PETITIONER,

v.

THE GALIGHER COMPANY

No. 83

THE UNITED STATES OF AMERICA, PETITIONER,

v.

GRAY-CANNON LUMBER COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 15, 1945
CERTIORARI GRANTED JUNE 18, 1945

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OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 13, 1945

CERTIORARI GRANTED JUNE 18, 1945

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IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE TENTH CIRCUIT.

Nos. 2820 to 2826.

UNITED STATES OF AMERICA, APPELLANT,

vs.

PETTY MOTOR COMPANY et al., APPELLEES.

Statement of Points to Be Relied Upon and Designation of
the Parts of Record to Be Printed.

The United States of America, appellant, in the above-entitled case, in conformity with Rule 13(1) of this Court, adopts the statement of points to be relied upon on appeal filed in District Court as the statement of points to be relied upon and states that the whole of the record as filed is necessary for the consideration of the case.

Respectfully submitted,

NORMAN M. LITTELL,
Assistant Attorney General,
Washington, D. C.

WILMA C. MARTIN,
Assistant, Department of Justice,
Washington, D. C.

DANIEL B. SHIELDS,
United States Attorney,
Salt Lake City, Utah.

Copy of Statement of Points to be Relied Upon, and Des-

ignation of the Parts of Record to be Printed, received this 1st day of September, 1943.

INDEPENDENT PNEUMATIC TOOL Co., a corporation,

CHARLES F. WIGGS, DBA Chicago Flexible Shaft Co.,

THE GALIGHER COMPANY, a corporation.

WILLIAM G. GRIMSDALL, DBA Grocer Printing Co.

By BENJAMIN L. RICH,

SHIRLEY P. JONES,

GORDON R. STRONG,

Their Attorneys.

GRAY CANNON LUMBER COMPANY, a corporation.

By H. A. SMITH,

Its Attorney.

MERRILL J. BROCKBANK, DBA Brockbank Apparel Co.

PETTY MOTOR COMPANY, a co-partnership,

By G. L. NELSON,

VERNON ROMNEY,

Their Attorneys.

WILLARD B. RICHARDS and

ALICE RICHARDS, his wife,

By BRIGHAM E. ROBERTS and

BEN E. ROBERTS, per Z.S.

Their Attorneys.

Filed Sept. 3, 1943. Robert B. Cartwright, Clerk.

[Order.]

Fourteenth Day, September Term, Monday, October 11th, A. D. 1943. Before Honorable Orie L. Phillips, Circuit Judge.

Pursuant to a stipulation filed in this cause, it is ordered that defendants' exhibits 12 and 13 be omitted from the printed record.

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE TILLMAN
D. JOHNSON, JUDGE OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, PRESIDING IN THE FOLLOWING
ENTITLED CAUSE:

UNITED STATES OF AMERICA, PETITIONER,

No. 406

v.

Civil

7 ACRES OF LAND, more or less, together with the build-
ings thereon, in Salt Lake City, Utah, et al., DEFENDANTS.

Petition for Condemnation.

To the Honorable, the Judge of the United States District
Court for the District of Utah:

1 The petition of the United States of America, a
sovereign, brought by Dan B. Shields, United States
Attorney for the District of Utah, acting under the instruc-
tions of the Attorney General and at the request of the Sec-
retary of War, respectfully shows:

1. That pursuant to the provisions contained in the Act
of Congress approved August 18, 1890 (26 Stat. 316), as
amended by the Acts of Congress approved July 2, 1917 (40
Stat. 241), April 11, 1918 (40 Stat. 518; 50 U.S.C., Sec. 171)
and March 27, 1942 (Public Law 507—77th Congress), which
acts authorize the acquisition of real property, temporary
use thereof or other interests therein that may be deemed
necessary for military, naval or other war purposes, funds
for such purposes having been appropriated by the Act of
Congress of July 2, 1942, the Secretary of War requested the
Attorney General of the United States to institute this action
for the purpose of acquiring the real property described in
Exhibit "A" hereto attached and by reference made a part
hereof, including the building thereon, known as the Old
Terminal Building, together with all easements appurtenant
to said property, to be used to house the offices of the Pacific
Division of the Army Engineers.

2. That the utmost haste in obtaining immediate pos-

session of the premises aforesaid is vital to the successful prosecution of the War, for which reason your petitioner desires the court to make an ex parte order granting immediate possession of said premises to your petitioner, or that the court forthwith issue a citation requiring all parties interested to appear and show cause, if any they have, upon a day certain why immediate and exclusive possession should not be granted.

3. That the property sought to be condemned, as aforesaid, is known as the Old Terminal Building at 222 South West Temple Street, Salt Lake City, Utah, situate upon the lands described in Exhibit "A," and the names of all tenants and the owner of said building, as well as all other parties interested and who are hereby made parties, as set forth on Exhibit "B" hereto attached and by reference made a part hereof.

2 4. That the estate sought to be taken herein for the purpose as aforesaid is a leasehold interest expiring June 30, 1945, with the right of election upon the part of the petitioner to surrender possession of said premises on June 30, 1943 or June 30, 1944 upon giving sixty days written notice so to do.

5. That a plat of such building, including floor plans, is attached to the original Petition for Condemnation herein filed and by reference made a part hereof.

Wherefore, petitioner prays that this Honorable Court will take jurisdiction of this cause and will make and enter all orders, judgments and decrees as may be necessary to bring all of said property before the Court and to make all parties, firms and corporations having any interest in said property parties defendant and will make and enter all orders, judgments and decrees as may be necessary to vest in petitioner a leasehold interest in and to said property for a term ending June 30, 1945, together with all easements set forth in Exhibit "A" and subject to existing easements as aforesaid, upon the payment of such amount as may be agreed on or as the Court may find to be just compensation for the taking of said property; that an order of this Court forthwith issue granting to petitioner the immediate and exclusive possession, occupancy and control of said property or that the Court forthwith issue a citation directed to each and all of

said defendants to appear and show cause on a day certain why an order of immediate possession and occupation should not be made and entered, and that the Court grant such other and further relief as may appear just and proper.

Dated at Salt Lake City, Utah, this 9th day of November, 1942.

UNITED STATES OF AMERICA,
By DAN B. SHIELDS,
United States Attorney.

Filed in United States District Court November 9, 1942.

[Exhibits A and B not attached to petition as set out in typewritten record.]

Order to Show Cause.

3. It appearing to the Court that on November 9, 1942 United States of America filed herein its Petition for Condemnation of certain property described in Exhibit "A" hereto attached and by reference made a part hereof under and by virtue of the provisions of the Acts of Congress approved August 18, 1890 and amendments thereto, including the Act of March 27, 1942 (Public Law 507-77th Congress), and the Secretary of War, acting under direction of the President of the United States, having found and determined that said property is needed to provide office space for the Pacific Division of the United States Army Engineers;

And it further appearing from the said Petition for Condemnation that the utmost haste in expediting this project is vital to the successful prosecution of the war and that adequate provision has been made for the payment of just compensation to the party or parties entitled thereto; and said Petition for Condemnation being brought for the purpose, among others, of obtaining an order of immediate possession, and the Court feeling that an ex parte order for immediate possession should not be granted but a citation should forthwith issue requiring the owner and lessees of said property to appear before the Court on a day certain and then and there show cause, if any there be, why an order of immediate possession of said property by the United States of America should not be granted;

And it further appearing to the Court that said Petition for Condemnation states a cause of action, and good cause appearing for the issuance of this order;

It is hereby ordered and adjudged that all of the parties listed and shown on Exhibit "B" attached hereto as owner and tenants appear before the Court in the United States District Court at Salt Lake City, Utah, in the Post Office Building of said City on November 10, 1942 at the hour of 1:30 p. m., and then and there show cause, if any there be, why an order should not be then and there made granting to United States of America, the petitioner herein, the right to the immediate and exclusive possession, use, occupation and control of the premises described in Exhibit "A" hereto attached as aforesaid, including the building on said premises and all rights and easements appurtenant thereto, which said building is located at 222 South West Temple Street, Salt Lake City, Utah, and known as the Old Terminal Building, to be used as offices for the Pacific Division of the United States Army Engineers, and subject to the easements herein stated; also subject to existing easements for public highways and alleys, public utilities and pipe lines.

That a copy of this Order, together with a copy of the petition, be served upon defendants not less than one day before the date of hearing said matter.

Dated at Salt Lake City, Utah, this 9th day of November, 1942.

TILLMAN D. JOHNSON,
United States District Judge.

Filed in United States District Court November 9, 1942.

Order of Possession.

5 This matter came on regularly for hearing on November 10, 1942 before the Court upon the Petition for Condemnation and Order to Show Cause why immediate possession of the premises herein described should not be granted, United States of America being represented by Colonel C. M. Clifford and Major H. O. Sexsmith of the United States Army Engineers, and O. K. Clay, Special Assistant United States Attorney; The Galigher Company,

Grocer Printing Company and Mutual Typesetting Company being represented by Benjamin L. Rich, attorney, Gray-Cannon Lumber Company being represented by H. A. Smith, attorney, Willard B. Richards Jr. and Alice B. Richards, his wife, being represented by Ben E. Roberts, attorney, Petty Motor Company being represented by Willard B. Richards Jr., and all other defendants appearing in person except Works Project Administration Art Center; and the Court having heard evidence in the matter and being fully advised, and good cause appearing for the granting of this order;

It is hereby ordered and adjudged that the petitioner herein is granted exclusive possession of the premises herein described, together with the building thereon, known as the Old Terminal Building, 222 South West Temple Street, Salt Lake City, Utah, subject to the easements hereinafter stated, also subject to existing easements for public highways and alleys, public utilities and pipe lines, and the defendants herein named, tenants in said building, are hereby required to vacate the premises now used and occupied by them on or before the following dates:

Independent Pneumatic Tool Company, a corporation of the State of Illinois	November 17, 1942
The Galigher Company	November 21, 1942
Chas. F. Wiggs, dba Chicago Flexible Shaft Co.	November 17, 1942
Anton J. T. Sorensen, dba Sorensen Realty Co.	November 17, 1942
Merrill J. Brockbank Apparel Co.	November 20, 1942
Gray-Cannon Lumber Company, a Utah Corporation as to Room 102 as to Room 100	November 17, 1942 November 20, 1942
W. G. Grimsdell, dba Grocer Printing Company	December 1, 1942
Mutual Typesetting Company, a cor- poration of the State of Utah	December 1, 1942
A. A. Hewett	November 17, 1942
Petty Motor Company	November 24, 1942

6 Said property is located in Township 1 South, Range 1 West, Salt Lake Base and Meridian, and described as follows:

Block 59, Plat A, Salt Lake City Survey, Portions of Lots 7 and 6, more particularly described as follows: Commencing 2 rods North from the Southeast corner of Lot 7, Block 59, Plat A, there shall be the place of beginning. Thence North 12 rods; West 153.1 feet, South 12 rods; East 153.1 feet to beginning. Subject to the right of others to use a right-of-way commencing 50 feet North of the Northeast corner of Lot 7, Block 59, Plat A. Thence West 153.1 feet; thence North 16.0 feet; thence East 153.1 feet; thence South 16.0 feet to the place of beginning.

Also, the right to use with others a right-of-way beginning 50 feet North and 153.1 feet West of the Northeast corner of Lot 7, Block 59, Plat A, Salt Lake City Survey. Thence North 16.0 feet; thence West 11.9 feet; thence South 66.0 feet; thence West 102.2 feet; thence South 86.0 feet; thence East 6.0 feet; thence South 46.0 feet; thence East 10.0 feet; thence North 122.0 feet; thence East 98.1 feet; thence North 60.0 feet to the place of beginning as reserved in Quit Claim Deed dated April 9, 1906, Recorded January 24, 1913, in Book 8-P of Deeds pages 508-9, records of County Recorder of Salt Lake County, Utah.

Also, subject to and together with the rights of the owners of the premises on the West of the premises hereinbefore described and to the grantees herein their respective successors, heirs and assigns, to use and enjoy as a party wall, all portions of all foundations, stone and brick work now constituting the party wall between the building situated on a portion of the above-described premises and the building situated on the premises adjoining on the West.

7 Dated this 11th day of November, 1942.

TILLMAN D. JOHNSON,
United States District Judge.

Filed in United States District Court November 11, 1942
at 9:30 A. M.

Answer of Defendant, Petty Motor Company,
a Partnership.

8 Comes now the defendant, Petty Motor Company, a partnership consisting of Charles B. Petty and Maggie C. Petty and enters its voluntary appearance in the above entitled action, and in answer to the Petition for Condemnation, admits and alleges as follows, to-wit:

1. This answering defendant, Petty Motor Company, a partnership, admits all of the allegations of said Petition for Condemnation, except as to the amount of indemnity payable to this defendant and this defendant respectfully alleges that it does not appear to oppose the Petition for Condemnation of a leasehold as set out in Paragraphs 3 and 4 of said Petition, but merely to assert its rights to receive just compensation and indemnity.

2. This defendant alleges that it was a tenant of the said premises described in the Petition for Condemnation, situated in Salt Lake City, Utah, and alleges that it was occupying the premises described in that certain lease dated October 26, 1942 by and between Willard B. Richards, Jr., Lessor and Petty Motor Company, Lessee, copy of which said Lease is hereto attached, marked as "Defendants Exhibit 1" which is by reference, made a part hereof.

3. That said Lease was for a period of one year beginning October 31, 1942 and ending October 31, 1943, and provided for payment of rent by Lessee at the rate of \$220.00 per month for the first four months; \$190.00 per month for the second four months and \$150.00 per month for the last four months of said year's lease. Said lease further gave and granted to Lessee an option to renew said lease for a period of one year at \$165.00 per month.

4. That under the terms of the Order to Vacate, issued by this Honorable Court, this answering defendant was required to vacate said premises not later than November 24, 1942 and did, in fact, vacate said premises on or about the 15th day of November, 1942; that the average monthly rental

9 required to be paid under the terms of the aforementioned Lease for the first year was \$186.66 per month; that said Lease had 11½ months of the first year still to run when this answering defendant was required to vacate said premises; that the rental value of the rented space is now and at all times up to and including October 31, 1943 will be not less than \$303 per month and that therefore, by reason of the facts hereinbefore stated and the loss of said space, this answering defendant will suffer damage in the sum of \$1337.91.

5. That the reasonable value of the provision in the aforementioned lease granting Lessee an option to rent said premises for an additional year at \$165.00 per month is the sum of \$264.00 and that the loss of said option will cause damage to this answering defendant in that said additional sum of \$264.00.

6. That by reason of the taking of said property by condemnation proceedings, this answering defendant has and will incur the following additional items of expense and damage, to-wit:

- | | | |
|-------|--|----------|
| (a) | Loss of \$330.00, being the unearned portion of the \$440 rent paid, in advance, to Lessor, for the months of November and December, 1942 | \$330.00 |
| (b) | The necessary cost and expense incurred by answering defendant in removing from the afore-described premises to new premises and servicing, as required by rules and regulations of the United States Government, 60 trucks at \$6.00 each | \$360.00 |
| Total | | \$690.00 |

Wherefore this answering defendant, Petty Motor Company, respectfully prays that the Judgment or Decree or Orders of this Court granting petitioner immediate and exclusive possession, occupancy and control of said property be conditioned upon the payment of \$2291.91 to this defendant, and that the Court make such further Order respecting

the granting of just compensation to this defendant as shall be equitable and appropriate in the premises.

ROMNEY & NELSON,
212 Kearns Bldg.,
Attorney for Defendant, Petty
Motor Company, a partner-
ship.

[Duly verified.]

Received copy this 30th day of November, 1942.

DAN B. SHIELDS,
United States Attorney.

Filed in United States District Court November 30, 1942.

Answer of the Defendants Willard B. Richards, Jr., and
Alice C. Richards, his Wife.

10 Comes now the defendants, Willard B. Richards,
Jr., and Alice C. Richards, his wife, and enter their
appearance in the above entitled action in answer to the
Petition for Condemnation, admit and allege as follows,
to-wit:

1. That the defendants are the owners in fee simple of
the real estate herein described in said Petition for Con-
demnation.

2. That the defendants, Willard B. Richards, Jr., and
Alice C. Richards, his wife, do not appear for the purpose
of opposing said Petition for Condemnation of a leasehold
as set out in Paragraph 3 and Paragraph 4 of said petition,
but merely to assert their rights to receive just compensa-
tion for said leasehold.

3. That the said defendants, Willard B. Richards, Jr.,
and Alice C. Richards, his wife, are able and willing to enter
into a leasehold agreement with the United States of Amer-
ica for a *leasehold* for the term beginning November 10,
1942, and ending June 30, 1943, for the sum of \$425.00 per
month with the option of a renewal provided that no re-
newal thereof would extend the period of occupancy of the
premises beyond the duration of the war and six months

thereafter, or for a period of three years from date, which ever period of time is the longer.

4. That the government shall have the right during the existence of said lease to make alterations, attach fixtures, and erect additions, structures, or signs in or upon the premises hereby leased, which fixtures, additions, or structures so placed in or upon or attached to said premises shall be and remain with and become a part of said building and premises, and shall at the expiration of said lease become the property of the lessor except all lighting fixtures and portable *petitions* installed by the government, which said lighting fixtures and portable *petitions* shall be removed from said building and premises within ten days immediately following the termination of said lease, being the intention of the lessors to have all permanent alterations and fixtures including the linoleum on the floor and all additions or structures so placed in or upon and attached to said premises to become the property of the lessors.

11 5. That the said government will maintain the entire building and premises in good state of repair, reasonable wear and tear by the elements accepted during the entire term of said lease and will pay for all utilities and repair during the entire period of said lease.

6. That the said lessors at the commencement of said lease shall put the roof in good repair and paint the east and south exterior of said building, and exterior windows and door trim of the entire building.

7. That the government reserves the right to *concel* said lease or any renewal thereof during the life of same by giving thirty days written notice of its intention to do so.

Wherefore: These defendants, Willard B. Richards, Jr., and Alice C. Richards, his wife, respectfully pray that the judgment or decree or order of this court granting petitioner's immediate and exclusive possession, occupation, and control of said property be conditioned upon the payment of a rental of \$425.00 per month, and the court makes such other and further order respecting the granting of

just compensation to the defendants above named as shall be equitable and appropriate in the premises.

ROBERTS & ROBERTS, Attorneys for the Defendants, Willard B. Richards, Jr. and Alice C. Richards, his wife.

(Duly verified.)

Filed in United States District Court November 28, 1942.

Answer (Gray-Cannon Lumber Co.).

12 Comes now Gray-Cannon Lumber Company, the defendant herein, and for answer to the Petition for Condemnation in the above entitled cause admits, denies and alleges as follows:

1. Admits all of the allegations contained in said Petition.

2. Alleges that Gray-Cannon Lumber Company is a corporation organized and existing under and by virtue of the laws of the State of Utah, engaged as a jobber and wholesale lumber dealer. That said corporation, in said business, was at the time of the filing of this action the tenant in possession of rooms designated Nos. 100 and 102 of said building. That said tenancy was held under and by virtue of a Lease made and entered into on or about the 1st day of August, 1942, for a period of 3 years to and including the 31st day of July, 1945. That the monthly rental provided for in said Lease is the sum of \$115.00.

3. That said leased premises so occupied by this answering defendant comprised approximately 8,000 square feet of space, of which approximately 700 square feet were used as an office and the balance of said floor space was used for the purpose of storing, handling and selling lumber at wholesale. That said leased premises included a driveway for loading and unloading and were under cover and heated. That said stock of lumber weighed approximately 500,000 pounds and that said premises were so constructed as to adequately support that weight. That said premises were centrally located in the business district of Salt Lake City and that immediately across the road in direct and unobstructed vision of the office of said leased premises was a

railroad siding where carloads of lumber could be shipped to this answering defendant and unloaded by it for storage in said warehouse, and that said premises were directly served with good, paved surface, *level* highways and approaches.

4. That this answering defendant is informed and believes, and upon such information alleges the fact to be, that the reasonable rental value of said premises, or of similar premises if the same were available for renting, was the sum of \$400.00 per month at the time the Order of Possession was issued in this cause, to-wit, the 11th day of November, 1942.

13 5. That the Order of Possession entered herein and served upon this answering defendant on or about the 11th day of November, 1942, required this answering defendant to vacate part of said leased premises by the 17th day of November, and the balance of said leased premises by the 20th day of November, and that this answering defendant did vacate said premises pursuant to said Order of Possession, although the same were not finally and completely vacated until a day or two after the time prescribed in said Order.

6. That this answering defendant is informed and believes, and upon such information alleges the fact to be, that between the 11th day of November, 1942, and the 20th day of November, 1942, or at any time since said 11th day of November, 1942, there were not in Salt Lake City and there are not now any available building space and facilities that can be rented at any price suitable for the use of this answering defendant in conducting said business, and that by reason of that fact there is no reasonable market rental value for such premises; that because there were no such premises available to this defendant, this defendant was unable to secure any substitute location for its business within the time required by said Order of Possession or at all, and it was therefore by said Order of Possession forced and compelled to discontinue its "less carload lot warehouse business". That the average profit of said "less carload lot warehouse business" was the sum of \$772.00 per month, and that the value of said business was the sum of \$10,000.

7. That in order to comply with the Order of this court to vacate said premises aforesaid, this answering defendant was forced and compelled to sell at forced sale a substantial part of its lumber and merchandise stock at a reduced or discounted price in order to sell the same immediately. That the difference between said reduced and discounted price and the current market sale value of the merchandise had the same been sold in regular business is the sum of \$740.28, which amount this answering defendant lost by reason of said forced sale.

8. That the cost of removing to a substitute storage space the unsold portion of said stock of lumber and merchandise and of moving the office of this answering defendant to a substitute office was and is the sum of \$418.14.

14 9. That this defendant had constructed, equipped and decorated a portion of said leased premises to make the same suitable for use as an office. That the cost of so equipping, decorating and constructing said office was the sum of \$1,593.11. That said office construction, decoration and equipment became and were a part of the building and were lost to this answering defendant when he was required to vacate said leased premises.

10. That no segregated rental was fixed for the portion of said building used as an office as aforesaid, but based on the rent required by defendant's lease on said leased premises the proportion of said rent for the space occupied by said office amounted to \$55.00 per month. That in order to obtain substitute office space and facilities of comparative desirability this answering defendant was compelled to and did pay a monthly rental of \$77.00.

11. That this answering defendant is entitled to be justly compensated for the loss sustained by it by reason of the taking of its leasehold interest for public use by the United States of America.

Wherefore, this answering defendant prays that upon the trial of this cause the above entitled court fix, ascertain and determine just compensation to be awarded to this defendant, and that judgment be rendered in favor of this de-

endant against the United States of America for the amount of such just compensation.

H. A. SMITH, Attorney for the Defendant,
Gray-Cannon Lumber Company.

(Duly verified.)

Received copy of the foregoing Answer this 9th day of December, 1942.

DAN B. SHIELDS,
United States Attorney.

Filed in United States District Court, December 9, 1942.

Motion to Strike and For More Definite Statement.
Gray-Cannon Lumber Company

15 Comes now petitioner and moves to strike Paragraphs 6 and 7 of Defendant's Answer for the reason that the same are immaterial to the issues in this case, loss of profits not being a proper measure of damages.

Moves to strike Paragraph 8 of said answer, the allegations therein being immaterial to the issues in this case for the reason that the cost of moving is not a proper measure of damages.

Moves to strike Paragraph 10 for the reason that the difference between the amount of rent defendant is now paying and the amount formerly paid is not a proper measure of damages.

Petitioner moves for an order requiring said defendant to make a more definite statement with reference to Paragraphs 2 and 9 of said answer, it being impossible to determine the conditions and provisions of the lease referred to in Paragraph 2, and it further being impossible to determine what equipping, decorating and constructing was done and therefore impossible to determine if such equipping etc. did in truth form a part of the realty.

That such information is needed to enable petitioner to properly prepare for trial in this case.

Dated this 6th day of January, 1943.

Q. K. CLAY, Special Assistant
United States Attorney.

Copy of the within Motion received this 9th day of January, 1943.

H. A. SMITH, Attorney for
Gray-Cannon Lumber Co.

Filed in United States District Court, January 9, 1943.

Motion to Strike.

Petty Motor Company, a Partnership

16 Comes now petitioner and moves to strike Paragraphs 5. and 6 of defendant's answer, for the reason that the items therein set forth as elements of damage are not the proper measure of damages and are not recoverable in this action.

O. K. CLAY, Special Assistant
United States Attorney.

Copy received this 12th day of January, 1943.

ROMNEY & NELSON, Attorneys for Defendant
Petty Motor Company, a Partnership.

Filed in United States District Court January 13, 1943.

Amended Answer and Claim for Compensation and Damages of Defendant Charles F. Wiggs, DBA Chicago Flexible Shaft Company.

17 Comes now Charles F. Wiggs, doing business as Chicago Flexible Shaft Company, one of the defendants named herein, and by leave of court first had and obtained, files this his amended answer to the petition for condemnation of the United States of America herein and admits, denies and alleges as follows, to-wit:

I.

Admits the allegations of paragraph 1 of said petition for condemnation, and alleges that the action is also for the purpose of acquiring all interests, including defendant's, in said building.

II.

Admits the allegations of paragraph 2 of said petition for condemnation.

III.

Admits the allegations of paragraph 3 of said petition. Further answering said paragraph 3, this defendant alleges that he is one of the parties interested in these condemnation proceedings; is one of the parties set forth in Exhibit "B" mentioned in said paragraph 3, is a party defendant in said condemnation proceedings, and is the owner of an interest in the property sought to be condemned described in Exhibit "A" of said petition for condemnation, to-wit, the owner of a leasehold interest in said property.

IV.

This defendant has no information respecting the intentions of the petitioner herein with reference to the property sought to be condemned or the estates sought to be taken herein, but as to this defendant, defendant alleges that his entire estate and interest in said property has been taken by the petitioner and defendant has been permanently and completely evicted from said property sought to be condemned, and has been dispossessed entirely of his estate, interest and possession in and to said property.

V.

18 Admits the allegations of paragraph 5 of said petition for condemnation.

VI.

Defendant denies each and every allegation of said petition for condemnation except as herein expressly admitted or qualified.

Further answering said petition and as a further defense thereto, this defendant alleges:

VII.

That as a result of and pursuant to said petition an order to show cause was issued by this court on the 9th day of November, 1942, and served upon this defendant to show cause before the court November 10, 1942, why an order of immediate possession of said property by the United States of America should not be granted and upon a hearing thereon before the court, this defendant, by order of the court dated November 11, 1942, was ordered and required to vacate said premises on or before November 17, 1942, and petitioner was granted exclusive possession of said premises sought to be condemned, as in said order of possession set forth, and this defendant has vacated said premises and has been completely, entirely and permanently excluded from said premises and petitioner is now in exclusive possession of the same.

VIII.

Defendant further alleges that at the time of his eviction by petitioner from the premises herein sought to be condemned by the petitioner, he was, and for more *than* twenty-six years immediately preceding said eviction, had been a tenant and in the exclusive possession and occupancy of that portion of said premises known as 224-226 South West Temple Street and was at the time of his eviction by the petitioner the owner of an interest in said property which now has been taken and occupied exclusively by the petitioner pursuant to the proceedings herein, and that he is now and at all times herein mentioned was engaged in the business of buying, selling and dealing in machinery and hardware under the name and style of Chicago Flexible Shaft Company, of which he is the sole owner and proprietor, and that such business was owned, conducted and operated by the defendant at the time of his eviction by the petitioner and for more than twenty-six years immediately prior thereto, at the premises and on the property taken by the petitioner pursuant to the proceedings herein.

IX.

That the defendant was the owner of an interest in the property taken by the petitioner and sought to be con-

demned herein and had the right to said ownership and possession of that portion thereof occupied by him as aforesaid, and would have continued his ownership, occupancy and tenancy at said premises for an indefinite period and for many years to come except for the taking of his property by these proceedings and the orders of the court herein pursuant thereto, by virtue of which said proceedings and orders defendant's property has been taken from him by the petitioner.

X.

That this defendant was paying rent and had for many years paid rent at a fair and reasonable rate for said premises and was conducting a successful and profitable business as aforesaid on said premises, which were in good condition and used, usable and necessary in the conduct of defendant's business; that by reason of the taking of his property herein, it was necessary for this defendant to move from said premises and locate his business elsewhere; that defendant diligently endeavored to secure a suitable location to which to remove his said business and property and was unable, by the exercise of all his efforts and diligence, to find any location in proximity to 224-226 South West Temple, or otherwise, the equivalent of or as suitable for the conduct and operation of his business as the premises occupied by him at 224-226 South West Temple; that it was impossible for him to obtain any location without assuming a two year lease and paying a bonus to the occupying tenant of \$500.00, which this defendant paid, and that after diligent efforts defendant secured and acquired another location at 46-50 West 4th South Street only by paying said bonus and by assuming said lease, which he did, for a period of seventeen months at an increase in additional cost and rental of \$50.00 per month over and above that which the defendant was paying and had paid
20 for a great many years last past for the use and occupancy of and as rental for the premises at 224-226 South West Temple Street.

XI.

That defendant's location at said premises 224-226 South West Temple Street was readily accessible and near to the business center of Salt Lake City and the building and property was readily adapted and adaptable to defendant's

purposes and uses as a permanent, efficient and successful business; that in order to move his business and equipment from his location at 224-226 South West Temple Street and install the same at 46-50 West 4th South Street, defendant was put to additional great and necessary expense and has been required to pay and has paid for work, labor, cartage, *transporation* and material, for moving and installing his business and equipment as aforesaid, a reasonable sum of approximately \$2100.00 and that all of said sum expended was necessary solely because and by reason of the taking of his property by the petitioner herein, and that by reason of petitioner's taking of defendant's property by the proceedings herein, defendant's business was completely interrupted and disturbed.

XII.

That at the time of its taking, the fair and reasonable value of the defendant's property taken and sought to be condemned by the petitioner in these proceedings was the sum of \$4500.00; that the loss resulting to defendant from the deprivation of his right to the ownership, possession and occupancy of his property taken and sought to be condemned herein, is the sum of \$4500.00, and defendant has been damaged in said sum by reason of said taking and loss and it will require at least said amount to reimburse defendant and make him whole for the taking and condemnation of his property herein.

XIII.

That defendant is entitled to be compensated in the sum of at least \$4500.00 by the petitioner herein for his property taken by these proceedings.

Wherefore, defendant prays that judgment may be had in his favor against the United States of America for the sum of \$4500.00 with interest, and that proper officers and agents of the United States be ordered and required to pay this defendant said sum as just compensation herein, and that whatever order of condemnation this court may make in favor of the United States of America shall be conditioned upon payment to this defend-

ant of just compensation in said sum or in such sum and amount as the court may find this defendant is entitled besides costs.

BENJAMIN L. RICH,
GORDON R. STRONG,
SHIRLEY P. JONES,

Attorneys for Defendant Charles F. Wiggs,
doing business as Chicago Flexible Shaft
Company.

(Duly verified.)

Received copy this 15th day of February, 1943.

DAN B. SHIELDS,
United States Attorney.

Filed in United States District Court February 15, 1943.

Amended Answer and Claim for Compensation and Damages
of Defendant, The Galigher Company.

22 Comes now The Galigher Company, a corporation,
one of the defendants named herein, and by leave of
court first had and obtained, files this its amended answer
to the petition for condemnation of the United States of
America herein and admits, denies and alleges as follows,
to-wit:

I.

Admits the allegations of paragraph 1 of said petition
for condemnation, and alleges that this action is also for
the purpose of acquiring all interests, including defendant's,
in said building.

II.

Admits the allegations of paragraph 2 of said petition
for condemnation.

III.

Admits the allegations of paragraph 3 of said petition.
Further answering said paragraph 3, this defendant alleges
that it is one of the parties interested in these condemna-
tion proceedings, is one of the parties set forth in Exhibit

"B" mentioned in said paragraph 3, is a party defendant in said condemnation proceedings, and is the owner of an interest in the property sought to be condemned described in Exhibit "A" of said petition for condemnation, to-wit, the owner of a leasehold interest in said property.

IV.

This defendant has no information respecting the intentions of the petitioner herein with reference to the property sought to be condemned or the estates sought to be taken herein, but as to this defendant, defendant alleges that its entire estate and interest in said property has been taken by the petitioner and defendant has been permanently and completely evicted from said property sought to be condemned, and has been dispossessed entirely of its estate, interest and possession in and to said property.

V.

23 Admits the allegations of paragraph 5 of said petition for condemnation.

VI.

Defendant denies each and every allegation of said petition for condemnation except as herein expressly admitted or qualified.

Further answering said petition and as a further defense thereto, this defendant alleges:

VII.

That as a result of and pursuant to said petition an order to show cause was issued by this court on the 9th day of November, 1942, and served upon this defendant to show cause before the court November 10, 1942, why an order of immediate possession of said property by the United States of America should not be granted and upon a hearing thereon before the court, this defendant, by order of the court dated November 11, 1942, was ordered and required to vacate said premises on or before November 21, 1942, and petitioner was granted exclusive possession of said premises sought to be condemned, as in said order of possession set forth, and this defendant has vacated said prem-

ises and has been completely, entirely and permanently excluded from said premises and petitioner is now in exclusive possession of the same.

VIII.

This defendant further alleges that it is now and at all times herein mentioned was and has been a corporation duly organized and existing under and by virtue of the laws of the State of Utah, with its principal place of business at Salt Lake City, Utah.

IX.

Defendant further alleges that at the time of its eviction by petitioner from the premises sought to be condemned by the petitioner, it was, and for more than eighteen years immediately preceding said eviction, had been a tenant and in the exclusive possession and occupancy of that portion of said premises known as 228-232 South West Temple Street and was at the time of its eviction by the petitioner the owner of an interest in said property which now has been taken and occupied exclusively by the petitioner pursuant to the proceedings herein, and that it is now and at all times herein mentioned was and has been engaged in the business, among other things, of doing and performing engineering work of all kinds for mining operations in the State of Utah and in the United States and other parts of the world, dealing in mining machinery of all kinds, and employing engineers, executives, and other employment to carry on said business and had upon said premises valuable, necessary furniture, fixtures, supplies, files, equipment and other property.

X.

That the defendant was the owner of an interest in the property taken by the petitioner and sought to be condemned herein and had the right to said ownership and possession of that portion thereof occupied by it as aforesaid, and would have continued its ownership, occupancy and tenancy at said premises for an indefinite period and for many years to come except for the taking of its property by these proceedings and the orders of the court herein pursuant thereto, by virtue of which said proceedings and orders

defendant's property has been taken from it by the petitioner.

XI.

That this defendant was paying rent and had for many years paid rent at a fair and reasonable rate for said premises and was conducting said business on said premises and said business was successful and profitable and that said premises were specially equipped and designed for the particular use and occupation of this defendant and were in good condition and used and usable and necessary in the conduct and operation of defendant's business, and that by reason of the taking of its property herein it was necessary for this defendant to move from said premises and locate its business elsewhere; that defendant was unable to secure another located as suitable and desirable as that taken from it by these proceedings and herein sought to be condemned, but it did acquire another location to which it removed at 48 South 2nd East Street, Salt Lake City, Utah; that in order to acquire said new location this defendant was required and it was necessary to execute a lease for said property at 48 South 2nd East Street, which was done covering the period of one year for such new location at an increase in cost and rental of \$115.00 per month over and above that which the defendant was paying and had paid for a great many years last past for the use and occupancy of and as rental for the premises at 228-232 South West Temple Street.

XII.

That defendant's location at said premises 228-232 South West Temple Street was readily accessible and near to the business center of Salt Lake City and the building and property was readily adapted and adaptable to defendant's purposes and uses and its office equipment, electrical systems and other necessary office installations and devices were properly and suitably and efficiently installed therein and affixed thereto as a part of a permanent, efficient and successful business; that in order to move, cart, transport and

install the said equipment, electrical systems, and other necessary office installations and devices from its location 228-232 South West Temple to 48 South 2nd East Street, defendant was put to additional great and necessary expense and has been required to pay and has paid for work, labor, cartage, transportation and material for moving and installing its business and equipment as aforesaid, a reasonable sum of approximately \$3600.00, which said expenditure was necessary solely because and by reason of the taking of defendant's property by the petitioner herein, and that by reason of petitioner's taking of defendant's property by the proceedings herein, defendant's business was completely interrupted, disturbed and suspended for several weeks.

XIII.

That at the time of its taking, the fair and reasonable value of the defendant's property taken and sought to be condemned by the petitioner in these proceedings was the sum of \$7500.00; that the loss resulting to defendant from the deprivation of its right to the ownership, possession and occupancy of its property taken and sought to be condemned herein, is the sum of \$7500.00, and defendant has been damaged in said sum by reason of said taking and loss and it will require at least said amount to reimburse defendant and make it whole for the taking and condemnation of its property herein.

XIV.

That defendant is entitled to be compensated in the sum of at least \$7500.00 by the petitioner herein for its
26 property taken by these proceedings.

Wherefore, defendant prays that judgment may be had in its favor against the United States of America for the sum of \$7500.00 with interest, and that proper officers and agents of the United States be ordered and required to pay this defendant said sum as just compensation herein, and that *whatever* order of condemnation this court may make in favor of the United States of America shall be conditioned upon payment to this defendant of just compensation in

said sum or in such sum and amount as the court may find this defendant is entitled, besides costs.

BENJAMIN L. RICH,
GORDON R. STRONG,
SHIRLEY P. JONES,
Attorneys for Defendant
The Galigher Co.

(Duly verified.)

Received copy this 15th day of February, 1943.

DAN B. SHIELDS,
United States Attorney.

Filed in United States District Court February 15, 1943.

Amended Answer and Claim for Compensation and Damages
of Defendant William G. Grimsdell, DBA Grocer Print-
ing Co.

27 Comes now William G. Grimsdell, doing business
as Grocer Printing Company, one of the defendants
named herein, and by leave of court first had and obtained,
files this his amended answer to the petition for condemna-
tion of the United States of America herein and admits,
denies and alleges as follows, to-wit:

I.

Admits the allegations of paragraph 1 of said petition
for condemnation, and alleges that this action is also for
the purpose of acquiring all interests, including defendant's,
in said building.

II.

Admits the allegations of paragraph 2 of said petition
for condemnation.

III.

Admits the allegations of paragraph 3 of said petition.
Further answering said paragraph 3, this defendant alleges
that it is one of the parties interested in these condemna-
tion proceedings, is one of the parties set forth in Exhibit

"B" mentioned in said paragraph 3, is a party defendant in said condemnation proceedings, and is the owner of an interest in the property sought to be condemned described in Exhibit "A" of said petition for condemnation, to-wit, the owner of a leasehold interest in said property.

IV.

This defendant has no information respecting the intentions of the petitioner herein with reference to the property sought to be condemned or the estates sought to be taken herein, but as to this defendant, defendant alleges that its entire estate and interest in said property has been taken by the petitioner and defendant has been permanently and completely evicted from said property sought to be condemned, and has been dispossessed entirely of its estate, interest and possession in and to said property.

V.

28 Admits the allegations of paragraph 5 of said petition for condemnation.

VI.

Defendant denies each and every allegation of said petition for condemnation except as herein expressly admitted or qualified.

Further answering said petition and as a further defense thereto, this defendant alleges:

VII.

That as a result of and pursuant to said petition an order to show cause was issued by this court on the 9th day of November, 1942, and served upon this defendant to show cause before the court November 10, 1942, why an order of immediate possession of said property by the United States of America should not be granted and upon a hearing thereon before the court, this defendant, by order of the court dated November 11, 1942, was ordered and required to vacate said premises on or before December 1, 1942, and petitioner was granted exclusive possession of said premises sought to be condemned, as in said order of possession set forth, and this defendant has vacated said prem-

ises and has been completely, entirely and permanently excluded from said premises and petitioner is now in exclusive possession of the same.

VIII.

Defendant further alleges that at the time of his eviction by petitioner from the premises herein sought to be condemned by the petitioner, he was, and for more than twenty-six years immediately preceding said eviction had been a tenant and in the exclusive possession and occupancy of that portion of said premises know as No. 212 South West Temple Street and was at the time of his eviction by the petitioner the owner of an interest in said property which now has been taken and occupied exclusively by the petitioner pursuant to the proceedings herein, and that he is now and at all times herein mentioned was and has been engaged in the business of owning, conducting and operating a commercial printing establishment under the name and

29 style of Grocer Printing Company, of which he is the sole owner and proprietor, and that such business was owned, conducted and operated by the defendant at the time of his eviction by the petitioner for more than twenty-six years immediately prior thereto, at the premises and on property taken by the petitioner pursuant to the proceedings herein.

IX.

That the defendant was the owner of an interest in the property taken by the petitioner and sought to be condemned herein and had the right to said ownership and possession of that portion thereof occupied by him as aforesaid, and would have continued his ownership, occupancy and tenancy at said premises for an indefinite period and for many years to come except for the taking of his property by these proceedings and the orders of the court herein pursuant thereto, by virtue of which said proceedings and orders defendant's property has been taken from him by the petitioner.

X.

That this defendant was paying rent and had for many years paid rent at a fair and reasonable rate for said premises and was conducting a successful and profitable

commercial printing business on said premises where he owned or had the exclusive use of machinery and equipment installed and attached on said leased premises, which said machinery and equipment was in good condition and used, usable and necessary in the conduct and operation of defendant's business; that by reason of the taking of his property herein it was necessary for this defendant to move from said premises and locate his business elsewhere; that defendant diligently endeavored to secure a suitable location to which to remove his said business and property and was unable, by the exercise of all his efforts and diligence, to find any location in proximity to 212 South West Temple, or otherwise, the equivalent of or as suitable for the conduct and operation of his business as the premises occupied by him at 212 South West Temple; that it was impossible for him to obtain any location without executing a long term lease, and that after diligent efforts, defendant secured and acquired another location at 147 South West Temple Street only by the executing of a lease, which

30 he did, for a period of five years at an increase in rental and cost of \$95.00 to \$100.00 per month over and above that which the defendant was paying and has paid for a great many years last past for the use and occupancy of and as rental for the premises at 212 South West Temple Street.

XI.

That defendant's location at said premises 212 South West Temple Street was readily accessible and near to the business center of Salt Lake City and the building and property was readily adapted and adaptable to defendant's purposes and uses and his machinery and equipment were properly and suitably and efficiently installed therein and affixed thereto as a part of a permanent, efficient and successful business; that in order to move, cart, transport and install his machinery and equipment from his location at 212 South West Temple to 147 South West Temple, defendant was put to additional great and necessary expense and has been required to pay and has paid for work, labor, cartage, transportation and material for moving and installing his business, machinery and equipment as aforesaid, a

reasonable sum of approximately \$3200.00 and will be required to expend immediately in order properly to install his business at the new premises and in order properly and adequately to use his new leasehold for his business, the sum of approximately \$1500.00 additional to what he has already expended, and that all of said sums expended and to be expended are reasonable, and necessary solely because and by reason of the taking of his property by the petitioner herein, and that by reason of petitioner's taking of defendant's property by the proceedings herein, defendant's business was completely interrupted, disturbed and suspended for several weeks.

XII.

That at the time of its taking, the fair and reasonable value of the defendant's property taken and sought to be condemned by the petitioner in these proceedings was the sum of \$12,500.00; that the loss resulting to defendant from the deprivation of his right to the ownership, possession and occupancy of his property taken and sought to be condemned herein, is the sum of \$12,500.00, and defendant has been damaged in said sum by reason of said taking, and loss and it will require at least said amount to reimburse defendant and make him whole for the taking and condemnation of his property herein.

XIII.

That defendant is entitled to be compensated in the sum of at least \$12,500.00 by the petitioner herein for his property taken by these proceedings.

Wherefore, defendant prays that judgment may be had in his favor against the United States of America for the sum of \$12,500.00 with interest and that proper officers and agents of the United States be ordered and required to pay this defendant said sum as just compensation herein, and that whatever order of condemnation this court may make in favor of the United States of America shall be conditioned upon payment to this defendant of just compensation in said sum and amount or in such sum or amount as the court

may find this defendant of just compensation in said sum or in such sum and amount as the court may find this defendant is entitled, besides costs.

BENJAMIN L. RICH,
GORDON R. STRONG,
SHIRLEY P. JONES,
Attorneys for Defendant William G. Grimsdell, doing business as Grocer Printing Company.

(Duly verified.)

Received copy this 15th day of February, 1943.

DAN B. SHIELDS,
United States Attorney for
the District of Utah.

Filed in United States District Court February 15, 1943.

Motion for Summary Judgment Against Charles F. Wiggs.
DBA Chicago Flexible Shaft Company.

32 Comes now petitioner, United States of America, and moves the court to make and enter a summary judgment in this action against the defendant Charles F. Wiggs, dba Chicago Flexible Shaft Company, upon the following grounds, to-wit.

That on November 9, 1942, petitioner herein filed its petition for condemnation to condemn a leasehold interest in the building at 222 South West Temple Street, Salt Lake City, Utah, known as the Old Terminal Building. for a term of years ending June 30, 1945, together with all easements appurtenant to said building, to be used to house the offices of the Pacific Division of Army Engineers; that upon a hearing had an order to show cause this court, on November 11, 1942, granted to petitioner as against the said Charles F. Wiggs, dba Chicago Flexible Shaft Company, the possession of said premises commencing November 17, 1942.

That petitioner entered into possession of said premises and now is in the possession of the same.

That on February 13, 1942, said defendant filed herein its amended answer claiming damages by reason of the taking of said property by petitioner, and by reason of the said defendant vacating said premises in the amount of \$3100.00, based upon the following, to-wit: For work, labor, cartage, transportation, and material for moving and installing his business equipment.

That none of the damages sought to be recovered by said defendant are recoverable, not being the proper measure of damages, if any, allowable by law, said items not constituting a taking of property within the meaning of the Federal Constitution.

That no other defense of any kind or character is pleaded by defendant, and no other item of damage is sought to be recovered by defendant, and no other issue is before the court for determination.

This motion is based upon the files and records in this case.

33 Wherefore, petitioner prays for a summary judgment in this action, granting to petitioner a leasehold interest in and to the property described in its petition for condemnation, for a term ending June 30, 1945, as against this answering defendant, decreeing that said defendant is not entitled to recover any damages by reason of this action, or by reason of defendant's removal from said premises, or otherwise.

Dated this 6th day of March, 1943.

O. K. CLAY, Special Ass't
United States Attorney.

Received copy of the foregoing Motion for Summary Judgment this 6th day of March, 1943.

BENJAMIN L. RICH,
SHIRLEY P. JONES,
Attorney for defendant,
Charles F. Wiggs, dba Chicago
Flexible Shaft Co.

Filed in United States District Court March 6, 1943.

**Motion for Summary Judgment Against The
Galigher Company, a corporation.**

34 Comes now the petitioner, United States of America, and moves the court to make and enter a summary judgment in this action against the above named defendant, upon the following grounds, to-wit:

That on November 9, 1942, petitioner herein filed its petition for condemnation asking to condemn a leasehold interest in the building at 222 South West Temple Street, Salt Lake City, Utah, known as the Old Terminal Building, for a term of years ending June 30, 1945, together with all easements appurtenant to said building, to be used to house the offices of the Pacific Division of Army Engineers; that upon a hearing had on an order to show cause this court, on November 11, 1942, granted to petitioner as against the said defendant The Galigher Company, the possession of said premises commencing November 21, 1942.

That petitioner entered into possession of said premises and now is in the possession of the same.

That on February 13, 1942, said defendant filed herein its amended answer and claim for compensation and damages, claiming damages by reason of the taking of said property by petitioner, and by reason of the said defendant having to vacate said premises, claiming damages in the amount of \$4,500.00 based upon the following items, to-wit:

Work, labor, cartage, transportation and material for moving and installing its business and equipment at a new location, and loss resulting to defendant by reason of said removal; that at all times herein mentioned said defendant was a tenant from month to month of the premises taken in this action, and the only damage claimed by said defendant in its said amended answer is as above stated.

That no other defense of any kind or character is pleaded by defendant, and no other item of damage is sought to be recovered by the said defendant, and no other issue is before the court for determination.

That this motion is based upon the files and records in this case.

Wherefore, your petitioner prays for summary judgment in this action granting to petitioner a leasehold interest in the property described in its petition for condemnation, for a term ending June 30, 1945, as against this answering defendant, decreeing that said defendant in not entitled to recover any damage by reason of this action, or by reason of defendant's removal from said premises, or otherwise.

Dated this 5th day of March, 1943

O. K. CLAY, Special Ass't
United States Attorney.

Received copy of the foregoing Motion for Summary Judgment this 6th day of March, 1943.

BENJAMIN L. RICH,
SHIRLEY P. JONES,
Attorney for Defendant, The
Galigher Company.

Filed in United States District Court March 6, 1943.

Motion for Summary Judgment Against William
G. Grimsdell dba Grocer Printing Company.

36 Comes now petitioner, United States of America, and moves the court to make and enter a summary judgment in this action against the above named defendant, upon the following grounds, to-wit:

That on November 9, 1942, petitioner filed herein a petition for condemnation, to condemn a leasehold interest in the building at 222 South West Temple Street, Salt Lake City, Utah, known as the Old Terminal Building, for a term of years ending June 30, 1945, together with all easements appurtenant to said building, to be used to house the offices of the Pacific Division of Army Engineers; that upon a hearing had on an order to show cause the court, on November 11, 1942, granted to petitioner as against this defendant the possession of said premises commencing December 1, 1942,

That petitioner entered into possession of said premises and now is in possession of the same.

That on February 13, 1943, said defendant filed its amended answer claiming damages by reason of the taking of said property by petitioner, and by reason of the said defendant vacating said premises, said damages so claimed by defendant being the following: \$11,000.00 because of increase in rent over and above which the defendant was paying in the Old Terminal Building, and for moving, carting, transporting and installing his machinery and equipment from his old location at 212 South West Temple Street, to 147 South West Temple Street, in Salt Lake City, Utah, and for a sum he "Will be required to spend immediately in order to properly install his business at the new premises, and in order properly and adequately to use his new leasehold for his business;" that at all times mentioned in said amended answer and herein mentioned said defendant was a tenant from month to month of the premises taken in this action, and the only damage claimed by him in his said amended answer is as above stated.

That none of the damages sought to be recovered by said defendant are recoverable in this action, not being
37 the proper measure of damages, if any, allowable by law, said items not constituting a taking of property within the meaning of the Federal Constitution.

That no other defense of any kind or character is pleaded by defendant, and no other item of damage is sought to be recovered, and no other issue is before the court for determination.

This motion *if* based upon the files and records in this case.

Wherefore, your petitioner prays for a summary judgment in this action, granting to petitioner a leasehold interest in and to the property described in its petition for condemnation, for a term ending June 30, 1945, as against this answering defendant, decreeing that said defendant is

not entitled to recover any damages by reason of this action, or by reason of defendant's removal, or otherwise.

Dated this 6th day of March, 1943.

O. K. CLAY, Special Ass't
United States Attorney.

Received copy March 6, 1943.

BENJAMIN L. RICH,
SHIRLEY P. JONES,
Attorneys for Wm. G. Grimsdell.

Filed in United States District Court March 6, 1943.

Minute Entry—March 12, 1943.

38 On this 12th day of March, 1943, plaintiff appearing by O. K. Clay, Special Assistant to the United States Attorney, and defendants by Vernon Romney and George Nelson, B. L. Rich, Shirley Jones, H. A. Smith and B. E. Roberts, their attorneys, and this cause came on for hearing on pretrial. Issues were summarized and to be transcribed by court reporter and submitted for signature. Trial of case on merits set for March 22, 1943. Certain motions to be argued on March 15, 1943.

Minute Entry—July 8, 1943.

39 On this 8th day of July, 1943, on motion of O. K. Clay, Special Assistant to the United States Attorney, it is ordered that the minute entry of March 15, 1943, be amended to read nunc pro tunc, as follows:

"On this 15th day of March, 1943, plaintiff appearing by O. K. Clay, Special Assistant to the United States Attorney, and defendants by Vernon Romney, Shirley Jones, H. A. Smith and B. E. Roberts, their attorneys, and this cause came on for hearing on certain motions of plaintiff. The court heard the arguments of counsel and denied plaintiff's motion for summary judgment against William G. Grimsdell d.b.a. Grocer Printing Company, The Galigher Company, a corporation, and Charles F. Wiggs, d.b.a. Chicago Flexible

Shaft Company, and denied plaintiff's motion to strike certain paragraphs from answer of the Petty Motor Company, a corporation, and denied plaintiff's motion to strike certain paragraphs from answer of Gray-Cannon Lumber Company and for more definite statement. The claims were consolidated for the purpose of trial, and case set for trial on merits for March 22, 1943."

Pretrial Order.

40 This cause coming on for pretrial on the 12th and 15th day of March, 1943, Mr. O. K. Clay appearing for plaintiff, and Mr. Ben E. Roberts for the owner of said premises, and Mr. Shirley P. Jones, Mr. Vernon Romney, and Mr. H. A. Smith for various tenants;

Now therefore, upon the statements of counsel for the respective parties as to the issues of law and fact to be tried, the following summary of said issues is hereby made and ordered filed herein, to-wit:

With reference to the owner of said premises the issue will be the reasonable rental value of the premises taken.

With reference to the former tenants the issue will be the compensation, if any, which they may be entitled to recover by reason of having to relinquish occupancy of said premises.

TILLMAN D. JOHNSON,
United States District Judge.

Filed in United States District Court March 16, 1943.

Answer and Claim for Compensation and Damages of
Defendant, Independent Pneumatic Tool Company.

41 Comes now Independent Pneumatic Tool Company, a corporation, one of the defendants named herein, and by leave of court first had and obtained, files this its answer to the petition for condemnation of the United States of America herein and admits, denies and alleges as follows, to-wit:

I

Admits the allegations of paragraph 1 of said petition for condemnation, and alleges that this action is also for the purpose of acquiring all interests, including defendant's, in said building.

II.

Admits the allegations of paragraph 2 of said petition for condemnation.

III.

Admits the allegations of paragraph 3 of said petition. Further answering said paragraph 3, this defendant alleges that it is one of the parties interested in these condemnation proceedings, is one of the parties set forth in Exhibit "B" mentioned in said paragraph 3, is a *part* defendant in said condemnation proceedings, and is the owner of an interest in the property sought to be condemned described in Exhibit "A" of said petition for condemnation, to-wit, the owner of a leasehold interest in said property by written lease expiring November 30, 1947, upon premises known as No. 216 South West Temple Street, a *part* of said Terminal Building described in said petition of the United States of America.

IV.

This defendant has no information respecting the intentions of the petitioner herein with reference to the property sought to be condemned or the estates sought to be taken herein, but as to this defendant, defendant alleges that its entire estate and interest in said property has been taken by the petitioner and defendant has been permanently and completely evicted from said property sought to be condemned, and has been dispossessed entirely of its estate, interest and possession in and to said property and has lost improvements and the value of remodeling which this defendant put in and made upon its said premises at 216 South West Temple Street prior to its eviction therefrom by these condemnation proceedings by the United States of America in the amount and value of \$.

V.

42 Admits the allegations of paragraph 5 of said petition for condemnation.

VI.

Defendant denies each and every allegation of said petition for condemnation except as herein expressly admitted or qualified.

Further answering said petition and as a further defense thereto, this defendant alleges:

VII.

That as a result of and pursuant to said petition an order to show cause was issued by this court on the 9th day of November, 1942, and served upon this defendant to show cause before the court November 10, 1942, why an order of immediate possession of said property by the United States of America should not be granted and upon a hearing thereon before the court, this defendant, by order of the court dated November 11, 1942, was ordered and required to vacate said premises on or before November 17, 1942, and petitioner was granted exclusive possession of said premises sought to be condemned, as in said order of possession set forth, and this defendant has vacated said premises and has been completely, entirely and permanently excluded from said premises and the improvements and remodeling theretofore put in and installed by this defendant, as hereinbefore alleged, and petitioner is now in exclusive possession of the same.

VIII.

This defendant further alleges that it is now and at all times herein mentioned was and has been a corporation duly organized and existing under and by virtue of the laws of the State of Illinois with its principal place of business at Chicago, Illinois; qualified to do business in the State of Utah with its principal place of business in Utah at Salt Lake City, Utah.

IX.

This defendant further alleges that at the time of its said

eviction by petitioner from the premises sought to be condemned, it was, and for substantially three years immediately preceding said eviction, had been a tenant and in the exclusive possession and occupancy of that portion of said premises known as No. 216 South West Temple Street as aforesaid, and was at the time of its eviction by the petitioner the owner of an interest in said property under a lease expiring November 30, 1947, as aforesaid, which
 43 has now been taken and occupied exclusively by the petitioner pursuant to the condemnation proceedings herein, and that it is now and at all times herein mentioned was and has been engaged in the business, among other things, of selling and contracting with respect to pneumatic and electric tools, appliances and machinery and employing mechanics, engineers, executives and other employees to carry on its business, and had upon said premises valuable, necessary furniture, fixtures, supplies, files, equipment, pneumatic and electric tools, machinery, and other property.

X.

That the defendant was the owner of an interest in the property taken by petitioner and sought to be condemned herein and had the right to said ownership and possession of that portion thereof occupied by it at No. 216 South West Temple Street as aforesaid, and would have continued its ownership, occupancy and tenancy at said premises during the period under said lease expiring November 30, 1947, and probably for many years thereafter, except for the taking of its property by these proceedings and the orders of the court herein entered pursuant thereto, and by virtue of which said proceedings and orders defendant's property has been taken from it by the petitioner.

XI.

That this defendant was paying rent for said premises at the rate of \$45.00 per month to November 30, 1945, and then at \$50.00 per month thereafter to November 30, 1947, as provided in its said lease, and which was a fair and reasonable rate of rent for said premises, and this defendant was conducting its said business on said premises and said business was successful and profitable and that said prem:

ises were specially equipped and designed for the particular use and occupation of this defendant and were in good condition and used and usable and necessary in the conduct and operation of defendant's business, and that by reason of the taking of its property herein it was necessary for this defendant to move from said premises and to locate its business elsewhere; that defendant was unable to secure another location as suitable and desirable as that taken from it by these proceedings and herein sought to be condemned, but it did acquire another location to which it removed at No. 54 East 4th South Street, Salt Lake City, Utah, and that in order to *acquire* said new location this defendant was required and it was necessary to execute a lease for said property at No. 54 East 4th South Street, which was done,

covering a period of five years from the 1st day of 44 December, 1942, for and during the 30th day of November, 1947, at an increase in cost and rental of \$5.00 per month for the first year and \$15.00 per month for the next two years, and \$10.00 per month for the next two years, and in the total sum of \$660.00 as such increased rental over and above that which the defendant was paying under its former lease upon said premises sought to be condemned.

XII.

That defendant's location at the said premises 216 South West Temple Street was readily accessible and near to the business district of Salt Lake City and the building and property was readily adapted and adaptable to defendant's purposes and uses and its office equipment, display rooms, and its office installations and devices, which were suitably and efficiently installed therein and affixed thereto as a part of a permanent, efficient and successful business; that in order to move, cart, transport and install the said equipment, pneumatic and electric tools, parts and machinery and office installations and devices from its location at 216 South West Temple Street to 54 East 4th South Street, defendant was put to additional great and necessary expense and has been required to pay and has paid for work, labor, cartage, transportation and material for moving and for conditioning and remodeling its said new location and installing its business and equipment therein, a reasonable sum

of \$950.00, and which amount was expended and said expenditure was necessary solely because and by reason of the taking of defendant's property by the petitioner herein, and that said sum of \$950.00 is in addition to defendant's loss and money paid out for remodeling its former location upon said premises sought to be condemned in said sum of \$615.58 as aforesaid, and by reason of petitioner's taking of defendant's property by these proceedings, defendant's business was completely interrupted, *distrubed* and suspended for several weeks.

XIII.

That at the time of its taking, the fair and reasonable value of the defendant's property and its right to possession of its leasehold interest taken and sought to be condemned by the petitioner in these proceedings, was the sum of \$3500.00; that the loss resulting to defendant from the deprivation of its right to the ownership, possession and occupancy of its property taken and sought to be *concerned* and the expenditures necessarily made by defendant in acquiring its new location, with additional rent as aforesaid, and for improvements and *removeling* as aforesaid,
 45 is the sum of \$3500.00 and defendant has been damaged in said sum by reason of said taking and loss and it will require said amount of \$3500.00 to reimburse defendant and make it whole for the taking and condemnation of its property herein.

XIV.

That defendant is entitled to be compensated in the sum of \$3500.00 by petitioner herein for its property taken by these proceedings.

Wherefore, defendant prays that judgment may be had in its favor against the United States of America for the sum of \$3500.00 with interest, and that proper officers and agents of the United States be ordered and required to pay this defendant said sum as just compensation herein, and that whatever order of condemnation this court may make in favor of the United States of America shall be conditioned upon payment to this defendant of just compensation in

said sum or in such sum and amount as the court may find this defendant is entitled, besides costs.

BENJAMIN L. RICH,
GORDON R. STRONG,
SHIRLEY P. JONES,
Attorneys for Defendant,
Independent Pneumatic Tool
Company.

(Duly verified.)

Received copy this 17 day of March, 1943.

DAN B. SHIELDS,
United States Attorney.

Filed March 17, 1943, in United States District Court.

Amended Answer of the Defendant, Petty
Motor Company, a Partnership.

46 Comes now the defendant, Petty Motor Company, a partnership consisting of Charles B. Petty, Maggie C. Petty, Rachel Petty Lunt, Norma Petty, Utahna Petty Belnap and Newman C. Petty and enters its voluntary appearance in the above entitled action, and in answer to the Petition for Condemnation, admits and alleges as follows, to-wit:

1. This answering defendant, Petty Motor Company, a partnership, admits all of the allegations of said Petition for Condemnation, except as to the amount of indemnity payable to this defendant and this defendant respectfully alleges that it does not appear to oppose the Petition for Condemnation of a leasehold as set out in Paragraphs 3 and 4 of said Petition, but merely to assert its rights to receive just compensation and indemnity.

2. This defendant alleges that it was a tenant of the said premises described in the Petition for Condemnation, situated in Salt Lake City, Utah, and alleges that it was occupying the premises described in that certain lease dated October 26, 1942 by and between Willard B. Richards, Jr., Lessor and Petty Motor Company, Lessee, copy of which

said Lease is hereto attached, marked as "Defendant's Exhibit 1" which is, by reference, made a part hereof.

3. That said Lease was for a period of one year beginning October 31, 1942 and ending October 31, 1943, and provided for payment of rent by Lessee at the rate of \$220.00 per month for the first four months; \$190.00 per month for the second four months and \$150.00 per month for the last four months of said year's lease. Said lease further gave and granted to Lessee an option to renew said lease for a period of one year at \$165.00 per month.

4. That under the terms of the order to vacate, issued by this Honorable Court, this answering defendant was required to vacate said premises not later than November 24, 1942 and did, in fact, vacate said premises on or about the 15th day of November, 1942; that the average monthly rental required to be paid under the terms of the aforementioned lease for the first year was \$186.66 per month, and the average monthly rental required to be paid for the second year of said lease was \$165.00 per month; that said lease had 11½ months of the first year and 12 months of second year still to run when this answering defendant was required to vacate said premises; that the rental value of the said rented space is now and at all times up to and including October 31, 1944 will be not less than \$303.00 per month; that this answering defendant intended to and would have exercised its option to renew said lease for the additional one year, from October 31, 1943 to October 31, 1944, at said rental of \$165.00 per month, had said Order to Vacate not been issued by this Honorable Court; that by reason of the issuance of the Order to Vacate, issued by this Honorable Court, it became necessary for this answering defendant, and it did move 60 trucks, which were stored in said rented premises to new locations, and required the servicing of said trucks in accordance with rules and regulations of the United States Government, resulting in the incurring by this answering defendant of an expense of \$6.00 for each such truck, amounting to a total of \$360.00.

That by reason of the issuance of the Order to Vacate by this Honorable Court, this answering defendant was and will be hereafter deprived of its right to occupy the aforescribed premises and that by reason thereof and

of the facts hereinbefore stated, and of the loss of occupancy of said space, this answering defendant has suffered damage in the sum of \$3353.91.

Wherefore, this answering defendant, Petty Motor Company, respectfully prays that the Judgment or Decree or Orders of this court granting petitioner immediate and exclusive possession, occupancy and control of said property be conditioned upon the payment of \$3353.91 to this defendant, and that the court make such further Order respecting the granting of just compensation to this defendant as shall be equitable and appropriate in the premises.

ROMNEY & NELSON, 212 Kearns Building,
Attorneys for Defendant Petty Motor Company, a partnership.

(Duly Verified.)

Received copy this 22nd day of March, 1943.

DAN B. SHIELDS,
United States Attorney.

Filed in United States District Court March 22, 1943.

Answer of the Defendant, Merrill J. Brockbank,
doing business as, Brockbank Apparel Company.

48 Comes now the defendant, Merrill J. Brockbank, doing business as, Brockbank Apparel Company, and in answer to the Petition for Condemnation, admits and alleges as follows, to-wit:

1. This defendant admits all of the allegations of said Petition for Condemnation, except as to the amount of indemnity payable to this defendant and this defendant respectfully alleges that it does not appear to oppose the Petition for Condemnation of a leasehold as set out in Paragraphs 3 and 4 of said Petition, but merely to assert its rights to receive just compensation and indemnity.

2. This defendant alleges that since the month of October 1928 continuously up until the time he vacated the said premises defendant was a tenant of the premises described in the Petition for Condemnation situated in Salt Lake City, Utah, and alleges that this defendant occupied that part of

the premises commonly known as Rooms 210, 235, 236, 237, 238, 239, 240, 241, and 242 on the second floor of the said building, covering a total floor space of approximately 2,426 square feet. That this defendant occupied the said premises and used the same continuously during the said period for the purpose of carrying on and conducting his business as a wholesale manufacturer and distributor of wearing apparel under the name of Brockbank Apparel Company.

3. That this defendant occupied the said premises during the entire period as aforesaid under a verbal rental agreement with the owner of the said premises for the payment of rent upon the said premises at the rate of \$22.50 per month the said rent being payable in advance on the first day of each and every month. That shortly before the order to vacate the said premises as hereinafter set forth, this defendant was assured repeatedly by Willard B. Richards, Jr., the owner of the said premises that the said defendant would be permitted to remain as a tenant in the said premises upon the same terms and conditions as the said defendant desired to do so, provided that said Richards may make improvements on said premises, for which reasonable adjustment of rental would be made.

49 4. That under the terms of the order to vacate, issued by this Honorable Court, this defendant was required to vacate the said premises not later than November 20, 1942, and did in fact vacate the said premises on or about the 20th day of November, 1942; that the monthly rental charge which would have been required of the said defendant for the rental of the said premises was the sum of \$22.50 per month; that the rental value of the said rented space is now and at all times up to and including the 30th day of June, 1945, will be not less than \$75.00 per month; that this defendant intended to and would have remained as a tenant in the said premises for many years to come and at least as long as the lease period sought to be acquired by the plaintiff. If he had the said order to vacate not been issued by this Honorable Court; that by reason of the issuance of the order to vacate by this Honorable Court as aforesaid, it became necessary for this defendant to, and he did, remove all of his equipment, furniture fixtures, supplies, stock in trade, merchandise and all other property owned by the said defendant to a new location in

Salt Lake City and to perform and have performed considerable work and labor and to use considerable materials necessary and incident to the removal of defendant's business as aforesaid at a total cost to this defendant for such removal in the sum of \$359.72.

That by reason of the issuance of the order to vacate by this Honorable Court this defendant was deprived and will hereafter be deprived of his right to occupy the premises hereinabove described and that by reason thereof and because of the facts hereinabove stated and of the loss of occupancy of the said space this defendant has suffered damage in the sum of \$1,987.22.

Wherefore, this defendant Merrill J. Brockbank, doing business as Brockbank Apparel Company, respectfully prays that the judgment or decree or order of this court granting the petitioner immediate and exclusive possession, occupancy and control of the said property be conditioned upon the payment of \$1,987.22 to this defendant, and that the court make such further order respecting the granting of just compensation to this defendant as shall be equitable and appropriate in the premises.

ROMNEY & NELSON, 212 Kearns Building,
Salt Lake City, Utah, Attorneys for Defendant Merrill J. Brockbank, doing business as, Brockbank Apparel Company.

(Duly Verified.)

50 Receipt of a copy of the attached Answer of Merrill J. Brockbank, doing business as Brockbank Apparel Company, is hereby acknowledged this 22nd day of March, 1943.

DAN B. SHIELDS,
United States District Attorney.

Filed in United States District Court March 22, 1943.

Amended Answer (Gray-Cannon Lumber).

51 Comes now Gray-Cannon Lumber Company, defendant herein, and for Amended Answer to the Petition for Condemnation in the above entitled cause admits, denies and alleges as follows:

1. Admits all of the allegations contained in said Petition.
2. Alleges that Gray-Cannon Lumber Company is a corporation organized and existing under and by virtue of the laws of the State of Utah and that it is now and has been since the year 1919 engaged in business as a jobber and wholesale dealer in lumber. That said business consists partly of selling and jobbing lumber in carload lots and partly of dealing in and warehousing of carloads and less carload lots of high priced building materials such as doors, windows, panels, ply wood, siding materials, insulation materials, boxes for packing fruit, egg cases, hardwood flooring and similar materials, not including, however, the warehousing of common lumber.
3. That said corporation in said business was at the time of the filing of this action and had been continuously since March, 1932, a tenant in possession of rooms designated No. 100 and 102 of the Old Terminal Building, referred to in the Complaint herein. That said tenancy was held under and by virtue of a Lease made and entered into on or about August 1, 1942, for a period of 3 years to and including July 31, 1945. That the monthly rental provided for in said Lease was the sum of \$115.00.
4. That said rooms Nos. 100 and 102 are on the ground floor of said building and front south on Pierpont Avenue in Salt Lake City and defendant's portion of said building is known as No. 116 Pierpont Avenue. That Pierpont Avenue is located midway between 2nd South and 3rd South Streets in Salt Lake City, Utah, and extends West from West Temple Street to First West Street and is centrally located in the business district of Salt Lake City, Utah. That Pierpont Avenue is a paved street connecting with the paved streets of West Temple and 1st West Streets. That extending into the block in which said place of business is located is a railroad spur available for use of this answering defendant, so that the carloads of lumber and other materials can be unloaded from railroad cars immediately across the road and in plain sight of the office of this answering defendant. That said Terminal Building, and particularly the ground floor thereof, is so constructed and reinforced that it will support exceptionally heavy weights and that said floor space so occupied by the

defendant would hold and support 10 carloads or more of lumber or other materials having a weight of 500,000 or more pounds. That all of said rooms 100 and 102 were inside the walls of said building, protected from the weather. That all of said space was heated with steam heat furnished by the landlord and that said landlord furnished the water without extra charge. That this answering defendant had partitioned off by permanent and finished walls an area at the southeast corner of room 100, 18 feet wide by 40 feet long, which partitioned portion was equipped and used as an office by this defendant. That this answering defendant and the Metropolitan Life Insurance Company, then the landlord of said building, had installed plate glass front, overhead doors, truck ramp, lights and telephones, air conditioner unit for said office, linoleum, built in desks, at a total cost of \$2,912.64, of which amount the Metropolitan Life Insurance Company as owner paid the sum of \$1,319.52, leaving a cost to this answering defendant for the permanent improvements installed in said occupied rooms of the sum of \$1,593.11, which improvements became and were a permanent and integral part of said building. That the truck ramp and approach to said building is so constructed that the large trucks of the defendant could and did drive into and out of said building and could be readily loaded and unloaded therein. That said building provided closed and locked storage and parking space for the trucks and passenger cars of the defendant used in connection with said business.

5. That the business of this defendant conducted in said premises aforesaid was a profitable and *prosperous* business. That from the less carload lot portion of the warehouse business conducted by this defendant in said premises it was earning an average profit of \$772.00 per month and that the value of said less carload lot warehouse business as a going business was \$10,000. That this answering defendant is informed and believes, and upon such information alleges the fact to be, that the reasonable rental value of the premises occupied by the defendant as aforesaid at the time of the commencement of this action was the sum of \$400.00 per month.

53

6. That on or about the 11th day of November, 1942, this court duly made and entered an Order of Pos-

session herein which required this answering defendant to vacate room 102 of said building on or before November 17, 1942, and room 100 of said building on or before November 20, 1942. That in compliance with said Order of Possession this defendant commenced immediately to vacate said premises. That it diligently attempted to find a substitute location to which it could remove its stock of warehouse merchandise and office and where it could continue said business. That this answering defendant was wholly unable to locate in Salt Lake City any other suitable and adequate place where it could conduct said warehouse business, and that by reason of the requirement that this answering defendant vacate said premises it was forced and compelled to discontinue said warehouse business, and this answering defendant has not since said date been able to locate any adequate place where it could conduct said warehouse business and said warehouse business has been entirely lost to this answering defendant. That this answering defendant secured space temporarily store a part of said warehouse stock and that the cost of removing the portion of said warehouse stock to said substitute place and the cost of removing its office equipment to a substitute office as hereinafter set forth was the sum of \$418.14. That said moving cost was the reasonable expense for said moving and the places to which said moving was made were the nearest available places for that purpose. That this answering defendant could not find storage space within the time allowed for the storage of part of said stock of warehouse merchandise and accordingly this defendant was forced to and did sell a portion of said merchandise at a forced sale at a discounted price, and that the difference between the sale price at such forced sale of the merchandise so sold and the reasonable market value of the merchandise so sold was the sum of \$740.28. That this answering defendant secured a substitute office within which to conduct the office portion of the business of this defendant at suite 533 Judge Building, Salt Lake City, Utah. That in order to obtain such substitute office space this defendant was required to and did agree to pay a monthly rental of \$77.00 for the office space so rented. That no fixed rental was established for the portion of the premises in room 100 of said condemned premises that was used for an office, but this defendant alleges that the proper-

tionate amount of rent which this defendant was paying for the space it used as an office was the sum of \$55.00 per month. That said substitute office space is not as large nor as desirable as the office space which this defendant formerly occupied. That the sum of \$77.00 per month is the reasonable rental value of the substitute space which this defendant does occupy.

7. That by reason of all of the foregoing facts the right and privilege of this defendant to continue to occupy said leased premises was of reasonable value to it of \$13,478.52, and that by reason of the condemnation by the plaintiff of the right to occupy said premises said defendant was pecuniarily damaged in the said sum of \$13,478.52 and that the sum of \$13,478.52 is the amount required to make this defendant pecuniarily whole and is just compensation to it for loss sustained by being compelled to vacate said premises.

Wherefore, this answering defendant prays that this court, upon the trial of this cause, ascertain and fix and determine just compensation to be awarded to this defendant in the sum of \$13,478.52 and that judgment be rendered in favor of this defendant against the United States of America for the amount of such just compensation.

H. A. SMITH, Attorney for the Defendant
Cray-Cannon Lumber Company.

(Duly Verified.).

Received copy of the foregoing Amended Answer this 24th day of March, 1943.

O. K. CLAY, Special Ass't United
States Attorney.

Filed in United States District Court March 24, 1943.

Minute Entry—March 30, 1943.

55 On this 30th day of March, 1943, come again said parties by their respective attorneys as aforesaid and the trial of this case was resumed. Milton V. Backman was entered as associate counsel with O. K. Clay, Special Assistant to the United States Attorney. Opening state-

ment was made by Shirley Jones on behalf of Independent Pneumatic Tool Co., Grocer Printing Company, Galigher Company and Chicago Flexible Shaft Company. On behalf of said defendants, witnesses W. G. Grimsdell, Samuel Baird, Charles F. Wiggs, and L. E. Booth heretofore sworn were called and examined, and F. Orin Woodbury, C. A. Gore, H. P. Kipp, J. E. Nelson, Edward A. Ashton, C. P. Petty and O. C. Neilson were sworn only. Plaintiff's motion for summary judgment as to certain defendants was by the court denied. The hour of adjournment having been reached the further trial of this case was continued until ten a. m. March 31st, and the jurors were duly admonished as to their duties during the recess and permitted to separate to meet the court as aforesaid.

Judgment in Favor of Defendant, The Galigher Company, a Corporation, and Against United States of America.

56 This case came on regularly for hearing on November 10, 1942, before the court, sitting without a jury, upon the petition for condemnation and order to show cause why immediate possession of the premises described in the petition herein should not be granted, the United States of America, petitioner, and defendant The Galigher Company, a corporation, appearing by their respective counsel,

The court herein on November 11, 1942, entered its order granting petitioner immediate exclusive possession of the premises occupied by the said defendant The Galigher Company and the other defendants herein in the building known as the Old Terminal Building, 222 South West Temple Street, Salt Lake City, Utah, and required the said defendant The Galigher Company and the other defendants herein forthwith to vacate the premises occupied by them in said building and described in the petition herein.

And it appearing that the defendant The Galigher Company, a corporation, and the other defendants herein, vacated their premises in the said Old Terminal Building November 21, 1942, pursuant to the said order of November 11, 1942, and that said premises were immediately and are now occupied exclusively by the petitioner herein.

And it appearing that on March 30, 1943, a jury of twelve persons being regularly impaneled and sworn to try said action and to determine the amount due defendant The Galigher Company, a corporation, as just compensation for the taking of its occupancy of its premises in the Old Terminal Building, its said premises being known as 228-232 South West Temple Street, Salt Lake City, Utah, as of the 11th day of November, 1942, and witnesses on the part of the respective parties having been duly sworn and examined and it having been stipulated that the United States of America, the petitioner herein, as a result of these proceedings, had entered into a lease of said Old Terminal Building with the owners thereof, which said lease made no provision for any compensation to the defendant The Galigher Company, a corporation, either by the petitioner herein or the owners of said building, and said petition herein having been dismissed as to the owners of said building, Willard Richards, Jr., and wife, and after hearing all the evidence and arguments of counsel and the instructions of the court, the jury retired to consider their verdict and subsequently returned to the court their verdict, which was and is in words and figures as follows, to-wit:

"We, the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of defendant The Galigher Company, a corporation, and against the United States of America, and we find the fair and just compensation involved herein to be in the sum of \$2500.00.

Dated: April 6, 1943.

J. E. SULLIVAN, Foreman."

And it appearing that the United States of America, the petitioner herein, has made no declaration of taking and has made no deposit into court for the said defendant The Galigher Company and has paid it nothing for the taking of its occupancy of said premises.

Wherefore, by reason of the law and by virtue of the premises,

It Is Ordered, Adjudged and Decreed that the defendant The Galigher Company, a corporation, have and recover from the United States of America the sum of \$2500.00.

It Is Further Ordered, Adjudged and Decreed that the defendant The Galigher Company, a corporation, have and recover from the petitioner, United States of America, interest on said sum of \$2500.00 at the rate of six per cent per annum from November 11, 1942, until paid.

Witness the Honorable Tillman D. Johnson, Judge of the above entitled court, this 10th day of April, 1943.

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court April 10, 1943

Judgment in Favor of Defendant, Independent Pneumatic Tool Company, a Corporation, and Against the United States of America.

58 This case came on regularly for hearing on November 10, 1942, before the court, sitting without a jury, upon the petition for condemnation and order to show cause why immediate possession of the premises described in the petition herein should not be granted, the United States of America, petitioner, and defendant Independent Pneumatic Tool Company, a corporation, appearing by their respective counsel,

The court herein on November 11, 1942, entered its order granting petitioner immediate exclusive possession of the premises occupied by the said defendant Independent Pneumatic Tool Company and the other defendants herein in the building known as the Old Terminal Building, 222 South West Temple Street, Salt Lake City, Utah, and required the said defendant Independent Pneumatic Tool Company and the other defendants herein forthwith to vacate the premises occupied by them in said building and described in the petition herein.

And it appearing that the defendant Independent Pneumatic Tool Company, a corporation, and the other defendants herein, vacated their premises in the said Old Terminal Building November 17, 1942 pursuant to the said order of November 11, 1942, and that said premises were immediately and are now occupied exclusively by the petitioner herein.

And it appearing that on March 30, 1943, a jury of twelve persons being regularly impaneled and sworn to try said action and to determine the amount due defendant Independent Pneumatic Tool Company, a corporation, as just compensation for the taking of its occupancy of its premises in the Old Terminal Building, its said premises being known as 216 South West Temple Street, Salt Lake City, Utah, as of the 11th day of November, 1942, and witnesses on the part of the respective parties having been duly sworn and examined and it having been stipulated that the United States of America, the petitioner herein, as a result of these proceedings, had entered into a lease of said Old

59 Terminal Building with the owners thereof, which said lease made no provision for any compensation to the defendant Independent Pneumatic Tool Company, a corporation, either by the petitioner herein or the owners of said building, and said petition herein having been dismissed as to the owners of said building, Willard Richards, Jr. and wife, and after hearing all the evidence and arguments of counsel and the instructions of the court, the jury retired to consider their verdict and subsequently returned to the court their verdict, which was and is in words and figures as follows, to-wit:

"We, the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of Defendant Independent Pneumatic Tool Company, a corporation, and against the United States of America, and we find the fair and just compensation involved herein to be in the sum of \$600.00.

Dated: April 6, 1943.

J. E. SULLIVAN, Foreman."

And it appearing that the United States of America, the petitioner herein, has made no declaration of taking and has made no deposit into court for the said defendant Independent Pneumatic Tool Company and has paid it nothing for the taking of its occupancy of said premises;

Wherefore, by reason of the law and by virtue of the premises,

It is ordered, adjudged and decreed that the defendant

Independent Pneumatic Tool Company, a corporation, have and recover from the United States of America the sum of \$600.00.

It is further ordered, adjudged and decreed that the defendant Independent Pneumatic Tool Company, a corporation, have and recover from the petitioner, United States of America, interest on said sum of \$600.00 at the rate of six per cent per annum from November 11, 1942, until paid.

Witness the Honorable Tillman D. Johnson, Judge of the above entitled court, this 10th day of April, 1943.

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court April 10, 1943.

Judgment in Favor of Defendant, W. G. Grimsdell d.b.a. Grocer Printing Company, and Against United States of America.

60 This case came on regularly for hearing on November 10, 1942, before the court, sitting without a jury, upon the petition for condemnation and order to show cause why immediate possession of the premises described in the petition herein should not be granted, the United States of America, petitioner, and defendant W. G. Grimsdell, doing business as Grocer Printing Company, appearing by their respective counsel,

The court herein on November 11, 1942, entered its order granting petitioner immediate exclusive possession of the premises occupied by the said defendant W. G. Grimsdell and the other defendants herein in the building known as the Old Terminal Building, 222 South West Temple Street, Salt Lake City, Utah, and required the said defendant W. G. Grimsdell and the other defendants herein forthwith to vacate the premises occupied by them in said building and described in the petition herein.

And it appearing that the defendant W. G. Grimsdell, doing business as Grocer Printing Company, and the other defendants herein, vacated their premises in the said Old

Terminal Building on December 1, 1942, pursuant to the said order of November 11, 1942, and that said premises were immediately and are now occupied exclusively by the petitioner herein.

And it appearing that on March 30, 1943, a jury of twelve persons being regularly impaneled and sworn to try said action and to determine the amount due defendant W. G. Grimsdell, doing business as Grocer Printing Company, as just compensation for the taking of his occupancy of his premises in the Old Terminal Building, his said premises being known as 212 South West Temple Street, Salt Lake City, Utah, as of the 11th day of November, 1942, and witnesses on the part of the respective parties having been duly sworn and examined and it having been stipulated that the United States of America, the petitioner herein, as a result of these proceedings, had entered into a lease of said Old Terminal Building with the owners thereof, which said lease made no provision for any compensation to the defendant W. G. Grimsdell, doing business as Grocer Printing

Company, either by the petitioner herein or the owners of said building, and said petition herein having been dismissed as to the owners of said building, Willard Richards, Jr. and wife, and after hearing all the evidence and arguments of counsel and the instructions of the court, the jury retired to consider their verdict and subsequently returned to the court their verdict, which was and is in words and figures as follows, to-wit:

"We, the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of Defendant W. G. Grimsdell d.b.a. Grocer Printing Company and against the United States of America, and we find the fair and just compensation involved herein to be in the sum of \$3000.00.

Dated: April 6, 1943.

J. E. SULLIVAN, Foreman."

And it appearing that the United States of America, the petitioner herein, has made no declaration of taking and has made no deposit into court for the said defendant W. G. Grimsdell and has paid him nothing for the taking of his occupancy of said premises.

Wherefore, by reason of the law and by virtue of the premises,

It Is Ordered, Adjudged and Decreed that the defendant W. G. Grimsdell, doing business as Grocer Printing Company, have and recover from the United States of America the sum of \$3,000.00.

It Is Further Ordered, Adjudged and Decreed that the defendant W. G. Grimsdell, doing business as Grocer Printing Company, have and recover from the petitioner, United States of America, interest on said sum of \$3,000.00 at the rate of six per cent per annum from November 11, 1942, until paid.

Witness the Honorable Tillman D. Johnson, Judge of the above entitled court, this 10th day of April, 1943.

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court April 10, 1943.

Judgment in Favor of Defendant Petty Motor Company and
Against United States of America.

62 This case came on regularly for hearing on November 10, 1942, before the court, sitting without a jury, upon their petition for condemnation and order to show cause why immediate possession of the premises described in the petition herein should not be granted, the United States of America, petitioner, and defendant Petty Motor Company, appearing by its respective counsel.

The court herein on November 11, 1942, entered its order granting petitioner immediate exclusive possession of the premises occupied by the said defendant Petty Motor Company and the other defendants herein in the building known as the Old Terminal Building, 222 South West Temple Street, Salt Lake City, Utah, and required the said defendant Petty Motor Company and the other defendants herein forthwith to vacate the premises occupied by them in said building and described in the petition herein.

And it appearing that the defendant Petty Motor Company and the other defendants herein, vacated their premises in

the said old Terminal Building November 24, 1942 pursuant to the said order of November 11, 1942, and that said premises were immediately and are now occupied exclusively by the petitioner herein.

And it appearing that on March 30, 1943, a jury of twelve persons being regularly impaneled and sworn to try said action and to determine the amount due Petty Motor Company, as just compensation for the taking of its occupancy of its premises in the Old Terminal Building, the said premises being known as 222 South West Temple Street, Salt Lake City, Utah, as of the 11th day of November, 1942, and witnesses on the part of the respective parties having been duly sworn and examined and it having been stipulated that the United States of America, the petitioner herein, as a result of these proceedings, had entered into a lease of said Old Terminal Building with the owners thereof, which said lease made no provision for any compensation to the defendant Petty Motor Company, either by the petitioner herein or the owners of said building, and said petition herein hav-

63 ing been dismissed as to the owners of said building, Willard Richards, Jr., and wife, and after hearing all of the evidence and arguments of counsel and the instructions of the court, the jury retired to consider their verdict and subsequently returned to the court their verdict, which was and is in words and figures as follows, to wit:

"We, the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of the defendant Petty Motor Company, and against the United States of America, and we find the fair and just compensation involved herein to be in the sum of \$360.00.

"Dated April 6, 1943.

J. E. SULLIVAN, Foreman."

And it appearing that the United States of America, the petitioner herein, has made no declaration of taking and has made no deposit into court for the said defendant Petty Motor Company and has paid them nothing for the taking of its occupancy of said premises.

Wherefore, by reason of the law and by virtue of the premises,

It is ordered, adjudged and decreed that defendant Petty

Motor Company have and recover from the United States of America the sum of \$360.00.

It is further ordered, adjudged and decreed that the defendant Petty Motor Company, have and recover from the petitioner, United States of America, interest on said sum of \$360.00 at the rate of six per cent per annum from November 11, 1942, until paid.

Witness the Honorable Tillman D. Johnson, Judge of the above entitled court, this 10th day of April, 1943.

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court April 10, 1943.

Judgment in Favor of Defendant, Merrill J. Brockbank, Doing Business as, Brockbank Apparel Company and Against the United States of America.

64 This case came on regularly for hearing on November 10, 1942, before the court, sitting without a jury, upon their petition for condemnation and order to show cause why immediate possession of the premises described in the petition herein should not be granted, the United States of America, petitioner, and defendant Merrill J. Brockbank, doing business as, Brockbank Apparel Company, appearing by their respective counsel,

The court herein on November 11, 1942 entered its order granting petitioner immediate exclusive possession of the premises occupied by the said defendant, Merrill J. Brockbank, doing business, as Brockbank Apparel Company and the other defendants herein in the building known as the Old Terminal Building, 222 South West Temple Street, Salt Lake City, Utah and required the said defendant Merrill J. Brockbank, doing business as Brockbank Apparel Company, and the other defendants herein forthwith to vacate the premises occupied by them in said building and described in the petition herein.

And it appearing that the defendant Merrill J. Brockbank, doing business as, Brockbank Apparel Company, and the other defendants herein, vacated their premises in the said Old Terminal Building November 20, 1942, pursuant to the said order

of November 11, 1942, and that said premises were immediately and are now occupied exclusively by the petitioner herein.

And it appearing that on March 30, 1943, a jury of twelve persons being regularly impaneled and sworn to try said action and to determine the amount due defendant Merrill J. Brockbank, doing business as Brockbank Apparel Company, as just compensation for the taking of his occupancy of his premises in the Old Terminal Building the said premises being known as 222 South West Temple Street, Salt Lake City, Utah, as of the 11th day of November, 1942, and witnesses on the part of the respective parties having been duly sworn and examined and it having been stipulated that the United States of America, the petitioner herein, as a result of these proceedings, had entered into a lease of said Old Terminal Building with the owners thereof, which said lease made no provision for any compensation to the defendant Merrill J. Brockbank, doing business as Brockbank Apparel Company, either by the petitioner herein or the owners of said
65 building, and said petition herein having been dismissed as to the owners of said building, Willard Richards, Jr., and his wife, and after hearing all of the evidence and arguments of counsel and the instructions of the court, the jury retired to consider their verdict and subsequently returned to the court their verdict, which was and is in words and figures as follows, to-wit:

"We, the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of defendant, Merrill J. Brockbank, doing business as Brockbank Apparel Company, and against the United States of America, and we find the fair and just compensation involved herein to be in the sum of \$400.00.

"Dated April 6, 1943.

J. E. SULLIVAN, Foreman."

And it appearing that the United States of America, the petitioner herein, has made no declaration of taking and has made no deposit into court for the said defendant, Merrill J. Brockbank, doing business as Brockbank Apparel Company, and has paid him nothing for the taking of his occupancy of said premises.

Wherefore, by reason of the law and by virtue of the premises,

It Is Ordered, Adjudged and Decreed that the defendant Merrill J. Brockbank, doing business as Brockbank Apparel Company have and recover from the United States of America the sum of \$400.00.

It is Further Ordered, Adjudged and Decreed that the defendant Merrill J. Brockbank, doing business as Brockbank Apparel Company, have and recover from the petitioner, the United States of America, interest on said sum of \$400.00 at the rate of 6% per annum from November 11, 1942, until paid.

Witness the Honorable Tillman D. Johnson, Judge of the above entitled court, this 10th day of April, 1943.

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court April 10, 1943.

Judgment in Favor of Defendant Charles F. Wiggs, d.b.a. Chicago Flexible Shaft Company, and Against United States of America.

66 This case came on regularly for hearing on November 10, 1942, before the court, sitting without a jury, upon the petition for condemnation and order to show cause why immediate possession of the premises described in the petition herein should not be granted, the United States of America, petitioner, and defendant Charles F. Wiggs, doing business as Chicago Flexible Shaft Company, appearing by their respective counsel,

The court herein on November 11, 1942, entered its order granting petitioner immediate exclusive possession of the premises occupied by the said defendant Charles F. Wiggs and the other defendants herein in the building known as the Old Terminal Building, 222 South West Temple St., Salt Lake City, Utah, and required the said defendant Charles F. Wiggs and the other defendants herein forthwith to vacate the premises occupied by them in said building and described in the petition herein.

And it appearing that the defendant Charles F. Wiggs, doing business as Chicago Flexible Shaft Company, and the other defendants herein, vacated their premises in the said

Old Terminal Building November 17, 1942, pursuant to the said order of November 11, 1942, and that said premises were immediately and are now occupied exclusively by the petitioner herein.

And it appearing that on March 30, 1943, a jury of twelve persons being regularly impaneled and sworn to try said action and to determine the amount due defendant Charles F. Wiggs, doing business as Chicago Flexible Shaft Company, as just compensation for the taking of his occupancy of his premises in the Old Terminal Building, his said premises being known as 224-226 South West Temple Street, Salt Lake City, Utah, as of the 11th day of November, 1942, and witnesses on the part of the respective parties having been duly sworn and examined and it having been stipulated that the United States of America, the petitioner herein, as a result of these proceedings, had entered into a lease of said Old Terminal Building with the owners thereof, which said lease made no provision for any compensation to the defendant Charles F. Wiggs, doing business as Chicago Flex-

67 ible Shaft Company, either by the petitioner herein or the owners of said building, and said petition herein having been dismissed as to the owners of said building, Willard Richards, Jr., and wife, and after hearing all the evidence and arguments of counsel and the instructions of the court, the jury retired to consider their verdict and subsequently returned to the court their verdict, which was and is in words and figures as follows, to-wit:

"We, the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of the Defendant Charles F. Wiggs d.b.a. Chicago Flexible Shaft Company, and against the United States of America, and we find the fair and just compensation involved herein to be in the sum of \$1800.00.

"Dated April 6, 1943.

J. E. SULLIVAN, Foreman."

And it appearing that the United States of America, petitioner herein, has made no declaration of taking and has made no deposit into court for the said defendant Charles F. Wiggs and has paid nothing for the taking of his occupancy of said premises.

Wherefore, by reason of the law and by virtue of the premises,

It Is Ordered, Adjudged and Decreed that the defendant Charles F. Wiggs, doing business as Chicago Flexible Shaft Company, have and recover from the United States of America the sum of \$1800.00.

It Is Further Ordered, Adjudged and Decreed that the defendant Charles F. Wiggs, doing business as Chicago Flexible Shaft Company, have and recover from the petitioner, United States of America, interest on said sum of \$1800.00 at the rate of six per cent per annum from November 11, 1942, until paid.

Witness the Honorable Tillman D. Johnson, Judge of the above entitled court, this 10th day of April, 1943.

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court April 10, 1943.

Judgment on Verdict.

68 The above entitled cause having come on regularly for trial before a jury following the Pretrial Order providing "With reference to the former tenants the issue will be the compensation, if any, which they may be entitled to recover by reason of having to relinquish occupancy of said premises," and that issue having been submitted to the jury, O. K. Clay appearing for the United States of America and H. A. Smith appearing for defendant Gray-Cannon Lumber Company, a corporation, and said jury having returned its verdict on said issue that said defendant Gray-Cannon Lumber Company should be compensated in the sum of \$1,700.00, now, good cause appearing therefor:

Judgment is hereby awarded to the defendant Gray-Cannon Lumber Company against the United States of America in the sum of One Thousand Seven Hundred Dollars (\$1,-

700.00) together with interest at the rate of 6 per cent per annum since November 11, 1942.

Witness the Honorable Tillman D. Johnson, Judge of the above entitled court, this 10th day of April, 1943.

TILLMAN D. JOHNSON, Judge.

Filed in United States District Court April 10, 1943.

Motion for New Trial.

69 Comes now United States of America, petitioner herein, and moves the court to grant a new trial as to all of the defendants herein, upon the following grounds, to-wit:

1. Excessive damages appearing to have been given under the influence of passion and prejudice.
2. Insufficiency of the evidence to justify the verdict, and that it is against law.
3. Error in law occurring at the trial and excepted to by petitioner, or deemed excepted to under the provisions of Section 104-39-2, Revised Statutes of Utah, 1933.

UNITED STATES OF AMERICA,
By DAN B. SHIELDS,
United States Attorney.
O. K. CLAY,
Spec. Ass't United States
Attorney.

Received copy of the above Motion for New Trial this 14th day of April, 1943.

GRAY CANNON LUMBER COMPANY, a corp.,
H. A. SMITH, Attorney.

Received copy of the above Motion for New Trial this 14th day of April, 1943.

MERRILL J. BROCKBANK, dba Brockbank Apparel
Company,
PETTY MOTOR COMPANY, a Partnership,
By ROMNEY & NELSON, Attorneys.

70 Received copy of the above Motion for New Trial this 14th day of April, 1943.

INDEPENDENT PNEUMATIC TOOL COMPANY,
a Corp.
CHARLES F. WIGGS, dba Chicago Flexible Shaft
Company,
THE GALIGHER COMPANY, a corporation,
WILLIAM G. GRIMSDELL, dba Grocer Printing
Company,
By SHIRLEY P. JONES,
BENJAMIN L. RICH,
GORDON R. STRONG,
Their Attorneys.

Filed in United States District Court, April 14, 1943.

Motion for New Trial.

71 Comes now petitioner, United States of America, and moves the court to grant a new trial as to the defendant Willard B. Richards upon the following grounds, to-wit:

1. Insufficiency of the evidence to justify the verdict and that it is against the law.
2. Error in law occurring at the trial and excepted to by petitioner or deemed excepted to under the provisions of Compiled Laws of Utah, 1933.

UNITED STATES OF AMERICA,
By DAN B. SHIELDS,

Filed in United States District Court April 19, 1943.

Minute Entry—April 24, 1943.

72 On this 24th day of April, 1943, plaintiff appearing by Allen G. Thurman, Special Assistant to United States Attorney, and this case came on for hearing on motion for new trial. No arguments were presented by counsel and the motion was denied by the court.

Notice of Appeal.

To: Independent Pneumatic Tool Company, a corporation, Charles F. Wiggs, DBA Chicago Flexible Shaft Company; The Galigher Company, a corporation; William G. Grimsdell, DBA Grocer Printing Company and to Shirley P. Jones and Benjamin L. Rich, Attorneys.

To: Merrill J. Brockbank, DBA Brockbank Apparel Company; Petty Motor Company, a partnership; and to Vernon Romney and George L. Nelson, Attorneys;

To: Willard B. Richards and Alice Richards, his wife; and to Ben E. Roberts, Attorney;

To: Gray Cannon Lumber Company, a corporation, and to H. A. Smith, its attorney:

73 Notice is hereby given that the petitioner, United States of America, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit, from the final judgments made and entered in the above entitled cause on April 10, 1943, in favor of the above named defendants and against the petitioner, and the whole thereof, said judgments being against the petitioner and in favor of the following named defendants in the following amounts:

Gray Cannon Lumber Company	\$1,700.00
Charles F. Wiggs, DBA Chicago Flexible Shaft Co.	1,800.00
Merrill J. Brockbank, DBA Brockbank Apparel Company	400.00
Petty Motor Company	360.00
Wm. G. Grimsdell, DBA Grocer Printing Co.	3,000.00
Independent Pneumatic Tool Co.	600.00
The Galigher Company	2,500.00

And also appeals from the order of the court denying the petitioner's motion for a new trial. Also *appears* from the court's order overruling the petitioner's motion to dismiss the action as to all tenant defendants after the court had dismissed the case as to Willard B. Richards and Alice Richards, his wife—landlord defendants.

74

Dated this 6th day of July, 1943.

DAN B. SHIELDS,
United States Attorney.
O. K. CLAY,
Special Assistant U. S. Attorney.
Attorneys for Petitioner.

A copy of the within Notice of Appeal received this 6th day of July, 1943.

INDEPENDENT PNEUMATIC TOOL Co., a corporation.

CHARLES F. WIGGS, DBA, Chicago Flexible Shaft Co.

THE GALIGHER COMPANY, a corporation,
WILLIAM G. GRIMSDALL, DBA Grocer Printing Company,

By BENJAMIN L. RICH,
GORDON R. STRONG,
SHIRLEY P. JONES,
Their Attorneys,

A copy of the within Notice of Appeal received this 6th day of July, 1943.

GRAY CANNON LUMBER COMPANY, a corporation,
By H. A. SMITH, Its Attorney.

A copy of the within Notice of Appeal received this 6th day of July, 1943.

MERRILL J. BROCKBANK, DBA Brockbank Apparel Company,

PETTY MOTOR COMPANY, a co-partnership,
By ROMNEY & NELSON, Attorneys.

A copy of the within Notice of Appeal received this 6th day of July, 1943.

WILLARD B. RICHARDS and
ALICE RICHARDS, his wife,
By ROBERTS & ROBERTS,
Attorneys.

Filed in United States District Court July 6, 1943.

Notice of Appeal.

To Petty Motor Company, and to Romney and Nelson, Attorneys:

75 You and each of you will please take notice that the petitioner, United States of America, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit, from the final judgment made and entered in the above entitled cause on April 10, 1943, in favor of Petty Motor Company and against the petitioner, in the sum of \$360.00, and from the whole of said judgment.

Dated this 7th day of July, 1943.

DAN B. SHIELDS,
United States Attorney.
O. K. CLAY,
Special Assistant United States
Attorney,
Attorneys for Petitioner.

Filed in United States District Court July 7, 1943.

Notice of Appeal.

To Merrill J. Brockbank, dba Brockbank Apparel Company, and to Romney and Nelson, Attorneys:

76 You and each of you will please take notice that the petitioner, United States of America, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit, from the final judgment made and entered in the above entitled cause on April 10, 1943, in favor of Merrill J. Brockbank, dba Brockbank Apparel Company, and against the petitioner, in the sum of \$400.00, and from the whole of said judgment.

Dated this 7th day of July, 1943.

DAN B. SHIELDS,
United States Attorney.
O. K. CLAY,
Spec. Ass't United States
Attorney,
Attorneys for Petitioner.

Filed in United States District Court July 7, 1943.

Notice of Appeal.

To William G. Grimsdell, dba Grocer Printing Company, and to Benjamin L. Rich, Gordon R. Strong, and Shirley P. Jones, Attorneys.

77 You and each of you will please take notice that the petitioner United States of America, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit, from the final judgment made and entered in the above entitled cause on April 10, 1943, in favor of William G. Grimsdell, dba Grocer Printing Company, and against the petitioner, in the sum of \$3,000.00, and from the whole of said judgment.

Dated this 7th day of July, 1943.

DAN B. SHIELDS,
United States Attorney.
O. K. CLAY,
Special Ass't United States
Attorney.

Filed in United States District Court July 7, 1943.

Notice of Appeal.

To Charles F. Wiggs, dba Chicago Flexible Shaft Company, and to Benjamin L. Rich, Gordon R. Strong, and Shirley P. Jones, Attorneys:

78 You and each of you will please take notice that the petitioner, United States of America, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit, from the final judgment made and entered in the above entitled cause on April 10, 1943, in favor of Charles F. Wiggs, dba Chicago Flexible Shaft Company, and against the petitioner, in the sum of \$1,800.00, and from the whole of said judgment.

Dated this 7th day of July, 1943.

DAN B. SHIELDS,
United States Attorney.
O. K. CLAY,
Special Ass't United States
Attorney.

Filed in United States District Court July 7, 1943.

Notice of Appeal.

To Independent Pneumatic Tool Company, a corporation,
and to Benjamin L. Rich, Gordon R. Strong, and Shirley
P. Jones, Attorneys:

79 You and each of you will please take notice that the
petitioner, United States of America, hereby appeals
to the United States Circuit Court of Appeals for the Tenth
Circuit, from the final judgment made and entered in the
above entitled cause on April 10, 1943, in favor of the said
Independent Pneumatic Tool Company, a corporation, and
against the petitioner, in the sum of \$600.00, and from the
whole of said judgment.

Dated this 7th day of July, 1943.

DAN B. SHIELDS,
United States Attorney.
O. K. CLAY,
Special Assistant United States
Attorney.

Filed in United States District Court July 7, 1943.

Notice of Appeal.

To The Galigher Company, a corporation, and to Benjamin
L. Rich, Gordon R. Strong, and Shirley P. Jones, At-
torneys:

80 You and each of you will please take notice that the
petitioner, United States of America, hereby appeals
to the United States Circuit Court of Appeals for the Tenth
Circuit, from the final judgment made and entered in the
above entitled cause on April 10, 1943, in favor of The Gali-
gher Company, a corporation, and against the petitioner, in
sum of \$2,500.00, and from the whole of said judgment.

Dated this 7th day of July, 1943.

DAN B. SHIELDS,
United States Attorney.
O. K. CLAY,
Special Ass't United States
Attorney.
Attorneys for Petitioner.

Filed in United States District Court July 7, 1943.

Notice of Appeal.

To Gray-Cannon Lumber Company, a corporation, and to H. A. Smith, Attorney:

81 You and each of you will please take notice that the petitioner, United States of America, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit, from the final judgment made and entered in the above entitled cause on April 10, 1943, in favor of Gray-Cannon Lumber Company, a corporation, and against the petitioner, in the sum of \$1,700.00, and from the whole of said judgment.

Dated this 7th day of July, 1943.

DAN B. SHIELDS,
United States Attorney.
O. K. CLAY,
Special Ass't United States
Attorney.
Attorneys for Petitioner.

Filed in United States District Court July 7, 1943.

Notice of Appeal.

To Willard B. Richards, Jr., and Alice B. Richards, his wife, and to Roberts and Roberts, their attorneys:

82 You and each of you will please take notice that the petitioner, United States of America, on July 7, 1943, appealed to the United States Circuit Court of Appeals for the Tenth Circuit, from the final judgments made and entered in the above entitled cause on April 10, 1943, against the petitioner and in favor of Petty Motor Company in the sum of \$360.00; Merrill J. Brockbank, dba Brockbank Apparel Company, in the sum of \$400.00; Gray-Cannon Lumber Company, a corporation, in the sum of \$1700.00; William G. Grimsdell, dba Grocer Printing Company, in the sum of \$3,000.00; The Galigher Company, a corporation, in the sum of \$2500.00; Charles F. Wiggs, dba Chicago Flexible Shaft Company, in the sum of \$1800.00; and the Independent

Pneumatic Tool Company, a corporation, in the sum of \$600.00, and from the whole of said judgments.

Dated this 9th day of July, 1943.

DAN B. SHIELDS,
United States Attorney.
O. K. CLAY,
Special Ass't United States
Attorney.

Filed in United States District Court July 9, 1943.

Praeceptum and Designation of Record.

To the Clerk of the Above Entitled Court:

83 You will please prepare the record on appeal to the Circuit Court of the United States for the Tenth Circuit and make a part thereof:

1. Petition for Condemnation.
2. Order to Show Cause.
3. Order of Possession.
4. Answer of the Defendant, Petty Motor Company, filed November 30, 1942.
5. Answer of the Defendants, Willard B. Richards, Jr., and Alice C. Richards, his wife.
6. Answer of the Gray Cannon Lumber Company, filed December 9, 1942.
7. Motion to Strike and for More Definite Statement of Answer of Gray Cannon Lumber Company, filed January 9, 1943.
8. Motion to Strike Parts of Answer of Petty Motor Company, filed January 13, 1943.
9. Amended Answer and Claim for Compensation and Damage of Defendants, Charles F. Wiggs, dba Chicago Flexible Shaft Company, filed February 15, 1943.
10. Amended Answer and Claim for Compensation and Damages of Defendant, The Galigher Company, filed February 15, 1943.

11. Amended Answer and Claim for Compensation and Damages of Defendant William G. Grimsdell, dba Grocer Printing Company, filed February 15, 1943.

12. Motion for Summary Judgment against Charles F. Wiggs, dba Chicago Flexible Shaft Company, filed March 6, 1943.

13. Motion for Summary Judgment against the Galigher Company, a corporation, filed March 6, 1943.

14. Motion for Summary Judgment against William G. Grimsdell, dba Grocer Printing Company, filed March 6, 1943.

15. Minutes of March 12, 1943, setting case for trial before a jury on March 22, 1943.

84 16. Minutes of the Court of March 15, 1943, denying Motions for Summary Judgment, Motions to Strike, and Motions for More Definite Statement.

17. Pre-trial Order, filed March 16, 1943.

18. Answer and claim for compensation and damages of defendant, Independent Pneumatic Tool Company, filed March 17, 1943.

19. Amended Answer of the Petty Motor Company filed March 22, 1943.

20. Answer of Defendant, Merrill J. Brockbank, dba Brockbank Apparel, filed March 22, 1943.

21. Amended Answer Gray-Cannon Lumber Company, filed March 24, 1943.

22. Minutes of March 30, 1943, overruling motions for summary judgment.

23. Judgment in favor of the Galigher Company, a corporation.

24. Judgment in favor of the Independent Pneumatic Tool Company, a corporation.

25. Judgment in favor of W. G. Grimsdell, dba Grocer Printing Company.

26. Judgment in favor of Petty Motor Company.

27. Judgment in favor of Merrill J. Brockbank, dba Brockbank Apparel.

28. Judgment in favor of Charles F. Wiggs, dba Chicago Flexible Shaft Company.

29. Judgment in favor of Gray-Cannon Lumber Company.

30. Motion for new trial as to Gray-Cannon Lumber Company, a corporation; Merrill J. Brockbank, dba Brockbank Apparel; Petty Motor Company; Independent Pneumatic Tool Company, a corporation; Charles F. Wiggs, dba Chicago Flexible Shaft Company; The Galigher Company, a corporation; William G. Grimsdell, dba Grocer Printing Company.

31. Motion for new trial as to defendants Willard B. Richards, Jr., and Alice C. Richards, his wife.

32. Minutes of April 24, 1943, overruling motions for new trial.

33. Notice of Appeal.

34. Transcript of evidence, two copies of which are supplied herewith.

35. Statement of points.

36. Statement of the evidence.

85 37. Copy of this Praecipe and Designation of Record.

38. Clerk's Certificate.

Dated this 4th day of August, 1943.

DAN B. SHIELDS,
United States Attorney.
O. K. CLAY,
Special Ass't United States
Attorney.
Attorneys for Petitioner.

Copy of the attached designation of record received this 5th day of August, 1943.

INDEPENDENT PNEUMATIC TOOL Co., a corporation,
CHARLES F. WIGGS, dba Chicago Flexible Shaft Co.,
THE GALIGHER COMPANY, a corporation,
WILLIAM G. GRIMSDALL, dba Grocer Printing Company,
By BENJAMIN L. RICH,
GORDON R. STRONG,
SHIRLEY P. JONES,
Their Attorneys.

Copy of the attached designation of record received this 5th day of August, 1943.

GRAY CANNON LUMBER COMPANY, a corporation.
By H. A. SMITH, Attorney.

Copy of the attached designation of record received this 5th day of August, 1943.

MERRILL J. BROCKBANK, dba Brockbank Apparel Company,
PETTY MOTOR COMPANY, a co-partnership,
By ROMNEY & NELSON,
By VERNON ROMNEY,
Attorneys.

Copy of the attached designation of record received this 5th day of August, 1943.

WILLARD B. RICHARDS, and
ALICE RICHARDS, his wife,
By ROBERTS & ROBERTS, Attorneys.

Filed in United States District Court August 5, 1943.

Motion and Order Extending Time in Which to File Record on Appeal to October 5th.

86 Comes now appellant and shows to the court:

That notice of appeal was filed in this action in the United States District Court for the District of Utah, Central Division, on July 7, 1943; that because of the size of the record and the amount of work in connection therewith, appellant,

after due diligence, finds it is impossible to complete said record and have the same filed in this court within the period of forty days as allowed by the rules of civil procedure, for which reason, appellant believes that an extension of time up to and including the 5th day of October, 1943, will be necessary in order to complete and file said record.

DAN B. SHIELDS,
United States Attorney.

Order.

Upon motion of appellant, it is hereby ordered that appellant, United States of America, be and is hereby granted up to and including the 5th day of September, 1943, in which to file its record on appeal in this action.

Dated this 7th day of August, 1943.

ORRIE L. PHILLIPS, Circuit Judge.

Filed in United States District Court August 9, 1943.

Amended Designation of Record.

87 Comes now petitioner United States of America and amends the designation of record herein filed by changing item 36 to read—

“36. Statement of evidence consisting of the entire transcript of the evidence in question and answer form.”

Dated this 9th day of August, 1943.

DAN B. SHIELDS,
United States Attorney.
O. K. CLAY,
Special Ass't United States
Attorney.

Copy of the within Amended Designation of Record received this 9th day of August, 1943.

INDEPENDENT PNEUMATIC TOOL Co., a corporation,
CHARLES F. WIGGS, dba Chicago Flexible Shaft Co.,
THE GALIGHER COMPANY, a corporation,
WILLIAM G. GRIMSDALL, dba Grocer Printing Company,
BENJAMIN L. RICH,
GORDON R. STRONG,
SHIRLEY P. JONES,
Their Attorneys.

Copy of the within Amended Designation of Record received this 9th day of August, 1943.

GRAY CANNON LUMBER COMPANY, a corporation.
H. A. SMITH, Its Attorney.

Copy of the within Amended Designation of Record received this 9th day of August, 1943.

MERRILL J. BROCKBANK, dba Brockbank Apparel Company,
PETTY MOTOR COMPANY, a co-partnership,
ROMNEY & NELSON,
Attorneys.

Copy of the within Amended Designation of Record received this 9th day of August, 1943.

WILLARD B. RICHARDS, and
ALICE RICHARDS, his wife,
ROBERTS & ROBERTS, Attorneys.

Filed in United States District Court August 9, 1943.

Additional Designation of Record.

88 Comes now petitioner United States of America and files herein additional designation of record, to-wit:

39. All exhibits in the case, those offered and not received as well as those offered and received.

40. All of the Court's instructions to the jury.

Dated this 10th day of August, 1943.

DAN B. SHIELDS,
United States Attorney.
O. K. CLAY,
Special Ass't United States
Attorney.

Copy of the within Additional Designation received August 10, 1943.

INDEPENDENT PNEUMATIC TOOL Co., a corporation,
CHARLES F. WIGGS, dba Chicago Flexible Shaft Co.,
THE GALIGHER COMPANY, a corporation,
WILLIAM G. GRIMSDALL, dba Grocer Printing Company,
BENJAMIN L. RICH,
GORDON R. STRONG,
SHIRLEY P. JONES,
Their Attorneys.

Copy of the within Additional Designation of Record received August 10, 1943.

GRAY CANNON LUMBER COMPANY, a corporation.
H. A. SMITH, Its Attorney.

Copy of the within Additional Designation of Record received August 10, 1943.

MERRILL J. BROCKBANK, dba Brockbank Apparel Company,
PETTY MOTOR COMPANY, a co-partnership,
ROMNEY & NELSON,
Attorneys.

89 Copy of the within Additional Designation of Record received August 10, 1943.

WILLARD B. RICHARDS, and
ALICE RICHARDS, his wife,
ROBERTS & ROBERTS, Attorneys.

Filed in United States District Court August 10, 1943.

Certificate of Clerk.

United States of America, District of Utah, ss.

90 I, W. B. Wilson, Clerk of the United States District Court for the District of Utah, do hereby certify that the foregoing pages numbered from 1 to 89 contain a full and correct copy of the original record and proceedings as requested in petitioner's designations with the exception of statement of evidence, the court's instructions to the jury, and exhibits, in cause numbered 406, Civil, wherein United States of America is petitioner and .7 acre of land, more or less, together with the building thereon, in Salt Lake City, Utah, et al., are defendants, now remaining among the records of the said court in my office. The foresaid statement of evidence including the court's instructions and exhibits have separate certifications.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid court at Salt Lake City, Utah, this 23rd day of August, A. D. 1943, and the 168th year of the Independence of the United States of America.

(Seal)

W. B. WILSON, Clerk.

Filed September 2, 1943. Robert B. Cartwright Clerk.

SUPPLEMENTAL TRANSCRIPT OF THE RECORD.

Order Permitting Filing of Amendment to
Designation of Record on Appeal.

- 1 Upon motion of petitioner and good cause appearing,

It is hereby ordered that petitioner be, and it hereby is, permitted to file its amendment to designation of record on appeal.

Dated this 26th day of August, 1943.

TILLMAN D. JOHNSON,
United States District Judge.

Filed in United States District Court August 26, 1943.

Amendment to Designation of Record on Appeal.

- 2 The United States of America, appellant in the above-entitled case, designates the following portions of the record to be contained in the record on appeal in addition to the portions heretofore designated:

1. Reporter's typewritten transcript of the proceedings on pre-trial, March 12 and 15, 1943.

2. Statement of points to be relied upon on appeal.

3. Order Permitting Filing of Amendment to Designation of Record on Appeal.

4. This amended designation.

Respectfully submitted,

DAN B. SHIELDS,
United States Attorney,
Salt Lake City, Utah.

Filed in United States District Court August 26, 1943.

Statement of Points to be Relied Upon on Appeal.

- 3 The United States of America, appellant in the above-entitled case, makes the following statement of points to be relied upon on appeal:

1. The district court erred in denying the motions for summary judgments against Charles F. Wiggs, D.B.A. Chicago Flexible Shaft Company; the Galigher Company, a corporation; and William G. Grimsdell, D.B.A. Grocer Printing Company.

2. The district court erred in denying the motion to strike and for a more definite statement of the answer of the Gray-Cannon Lumber Company.

3. The district court erred in denying the motion to strike parts of the answer of the Petty Motor Company.

4. The district court erred in admitting any evidence on behalf of Charles F. Wiggs, D.B.A. Chicago Flexible Shaft Company; the Galigher Company, a corporation; William G. Grimsdell, D.B.A. Grocer Printing Company; and Merrill J. Brockbank, D.B.A. Brockbank Apparel Company.

5. The district court erred in admitting the following evidence on behalf of the tenants.

(a) The cost of moving from the Old Terminal Building to their new locations, including costs of improving, repairing or renovating the new locations, installing equipment or machinery at the new locations, and other expenses caused by or incidental to moving.

(b) The rent formerly paid at the Old Terminal Building, the rent being paid at the premises to which they moved, and the difference between the latter rent and the rent formerly paid at the Old Terminal Building.

(c) The cost of heat and water for the premises to which the tenants moved.

(d) The volume of business done by the tenants at the Old Terminal Building.

(e) That the tenants would have remained at the Old Terminal Building indefinitely if the United States had not taken the property, that they were unwilling to move, and that they would not have been willing to move even if they had been paid the costs of moving or similar sums.

(f) The cost of improvements made by the tenants at the Old Terminal Building.

5 (g) The testimony of W. G. Grimsdell as to the length of time he had occupied the Old Terminal Building at \$80 per month rent, the length of time he had occupied the building without a lease, the volume of business conducted there, the estimated cost of improvements at the premises to which he moved, and his unwillingness to move even if the cost of moving and the increase in rent at the new premises had been paid for him.

(h) The testimony of Sam Baird as to the rent he was paying at the premises to which he moved.

(i) The testimony of Charles F. Wiggs as to the costs of moving listed in Exhibit No. 4, including removal expenses, costs of improving or repairing the premises to which he moved, increased rent and a bonus paid to acquire a lease at the new premises.

(j) The testimony of Lionel E. Booth that his company would not have moved for \$5,000.

(k) The testimony of F. Orin Woodbury as to the reasonableness of the estimated costs of heating the premises to which the Grocer Printing Company, the Chicago Flexible Shaft Company, and the Galigher Company had moved, the estimated cost of insulating the Grocer Printing Company's new location, and that the Chicago Flexible Shaft Company had done the best it could in obtaining a new location.

6 (l) The opinion of F. Orin Woodbury as to the reasonable value of the occupancy of the Grocer Printing Company, the Independent Pneumatic Tool Company, the Chicago Flexible Shaft Company, and the Galigher Company at the Old Terminal Building.

(m) The testimony of Leonard Adams as to the cost of improvements made at the Old Terminal Building, the amount of stock in the Gray-Lumber Company's warehouse, the amount sold at a reduced price, the difference between the market price of the stock sold and the sale price and the fact that the warehouse business had to be discontinued.

(n) The testimony of Mel J. Brockbank that he had had no indication that he would be required to move.

(o) The testimony of Mel J. Brockbank as to the cost of moving, increased rent, and other items of expense listed in Exhibit No. 7.

(p) The testimony of Charles B. Petty as to the cost of moving.

6. The district court erred in refusing to strike the following evidence:

(a) The testimony of W. G. Grimsdell as to the estimated cost of improvements at the premises to which he moved

7 (b) The testimony of Mel J. Brockbank as to the cost of moving, increased rent, and other items of expense listed in Exhibit No. 7.

7. The district court erred in overruling the Government's objection to the lease of the Gray-Cannon Lumber Company.

8. The district court erred in overruling the Government's objections to the lease of the Independent Pneumatic Tool Company.

9. The district court erred in denying the Government's motions to dismiss the proceedings as to all the parties.

10. The district court erred in denying the Government's motion for a directed verdict as to all of the Tenants except the Petty Motor Company.

11. The district court erred in not valuing the interest taken by the United States as if the property were in a single ownership.

12. The district court erred in not requiring that any compensation due the tenants be deducted from the fair rental value of the property to be paid the owner.

13. The district court erred in instructing the jury as to the measure of damages.

14. The district court erred in leaving to the jury the interpretation of the legal meaning of just compensation.

8 15. The district court erred in permitting the jury to determine how the value of the tenants' interests should be measured.

16. The district court erred in permitting the jury to consider costs of moving, costs of improving, repairing or renovating the premises to which they moved, costs of re-installing equipment or machinery and the rents being paid at the new premises in determining the value of the tenants' interests in the property taken.

17. The district court erred in making no practical distinction, except for the uncertainty of the term, between a tenancy at will or from month to month and a tenancy by lease.

18. The district court erred in instructing the jury that:

(a) A month to month tenancy is private property within the meaning of the Constitution.

(b) A month to month tenant is entitled to just compensation.

(c) A tenant is entitled to compensation whether his tenancy is based upon a term for years or from month to month.

(d) A tenancy from month to month is good against the United States.

19. The district court erred in denying the Government's motion for a new trial.

9 20. The district court erred in entering judgments against the United States in favor of the tenants.

21. The district court erred in dismissing the proceedings as to the owner, but not as to the tenants.

NORMAN M. LITTELL,
Assistant Attorney General.

DANIEL B. SHIELDS,
United States Attorney,
Salt Lake City, Utah.

WILMA C. MARTIN, Attorney,
Department of Justice,
Washington, D. C.

10° Copy of Amendment to Designation of Record on Appeal together with copy of Statement of Points to be Relied Upon on Appeal, received this 27th day of August, 1943.

INDEPENDENT PNEUMATIC TOOL
Co., a corporation.
CHARLES F. WIGGS, DBA
Chicago Flexible Shaft Co.
THE GALIGHER COMPANY;
a corporation.
WILLIAM G. GRIMSDSELL,
DBA Grocer Printing Co.
BENJAMIN L. RICH,
GORDON R. STRONG,
SHIRLEY P. JONES,
(Their Attorney).

Copy of Amendment Designation of Record on Appeal together with copy of Statement of Points to be Relied Upon on Appeal, received this 27th day of August, 1943.

GRAY CANNON LUMBER COMPANY,
a corporation.
H. A. SMITH, (Its Attorney).

Copy of Amendment to Designation of Record on Appeal together with copy of Statement of Points to be Relied Upon on Appeal, received this 27th day of August, 1943.

MERRILL J. BROCKBANK,
DBA Brockbank Apparel Co.
PETTY MOTOR COMPANY,
a co-partnership.
ROMNEY & NELSON,
(Attorneys).

Copy of Amendment to Designation of Record on Appeal together with copy of Statement of Points to be Relied Upon on Appeal, received this 27th day of August, 1943.

WILLARD B. RICHARDS and
ALICE RICHARDS, his wife.
ROBERTS & ROBERTS.

Filed in United States District Court August 27, 1943.

Certificate of Clerk.

United States of America, District of Utah, ss.

I, W. B. Wilson, Clerk of the United States District Court for the District of Utah, do hereby certify that the foregoing pages numbered from 1 to 10 contain a correct copy of the original records as requested in Plaintiff's Amended Designation, in the cause numbered 406, Civil, wherein United States of America is petitioner and .7 Acres of Land, together with Building thereon, et al., is defendant, now remaining among the records of the said court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid court at Salt Lake City, Utah, this 27th day of August, 1943, and the 168th year of the Independence of the United States of America.

(Seal)

W. B. WILSON, Clerk.

Filed September 2, 1943. Robert B. Cartwright, Clerk.

Reporter's Transcript of Proceedings on Pretrial

Appearances: O. K. Clay, Esq., for Plaintiff; Shirley P. Jones, Esq., Benjamin L. Rich, Esq., for certain tenants. Vernon Romney, Esq., George L. Nelson, Esq., for certain tenants. H. A. Smith, Esq., for certain tenants. Ben E. Roberts, Esq., for owner of building.

Reported by E. M. Garnett.

Salt Lake City, Utah, March 12, 1943: 1:30 P. M.

Before Honorable Tillman D. Johnson, Judge.

2 The Court: Now, what is the next case?

Mr. Clay: The next, if your Honor please, is what we call the old Terminal Building. It appears on the calendar as Civil 406, United States versus .7 acres of land together with buildings thereon.

As the calendar shows, the different claimants are represented by different counsel.

The Court: The Terminal Building? What number is that?

Mr. Clay: That is 222 South on West Temple.

The Court: Hasn't that more than one number, there?

Mr. Clay: Yes, but that is the main entrance—222.

The Court: What I want is to get the claimants.

Mr. Rich: In that matter may we enter our appearance for one of the defendants, Independent Pneumatic Tool Company, served with summons.

That defendant has filed its informal claim with the Army Engineers, with a copy to Mr. Clay, but has not entered its general appearance or filed their formal claim by any pleading.

The Court: Has it a door entrance with a number on it?

3 Mr. Rich: Yes—216 South West Temple. There are numbers on both sides of the main entrance.

May we have five days to file our answer and claim?

The Court: Yes.

Mr. Rich: We just got into it last evening.

The Court: 216 South West Temple. What part of the building is it?

Mr. Rich: Ground floor.

The Court: The south end of the building?—where, in the building?

Mr. X (tenant): Near the north end of the building, next to the printing shop, north of the main entrance.

The Court: Are you lessees?

Mr. Rich: Yes.

The Court: You are tenants?

Mr. Rich: That is right.

The Court: Tenants of how many rooms?

Mr. Rich: One storeroom—office and storeroom.

The Court: They are separate, are they?

Mr. Rich: No, all one room.

The Court: You mean where you merchandise?

Mr. Rich: Where we have our office and have samples, all that sort of thing—telephones.

The Court: Office and business room?

Mr. Rich: Staff of employees.

The Court: What dimensions?

4 Mr. Rich: It is not described in the lease.

The Court: Can you give us the average depth?

Mr. Rich: The government has a map of the whole thing.

Mr. Clay: I don't have a map.

Mr. Rich: It was here when we were ordered to get out.

Mr. Clay: It might be in the original file.

Mr. X (tenant): Those rooms are $18\frac{1}{2}$ feet wide and about 140 feet deep.

The Court: Is it on the ground floor?

Mr. Rich: Yes, your Honor.

The Court: How big a room is it?

Mr. Jones: On the map it says "Room 106", but it has no dimensions.

Mr. X (tenant): It is about 140 feet deep.

The Court: Has it "No. 106" on the door?

Mr. Jones: It is on the door; each room is numbered on the door; also numbered with the street number. The first room north is 107.

The Court: He calls this 106.

Mr. Rich: It has the street number of 216.

The Court: What are the dimensions of it?

Mr. Rich: It is about 18 feet wide and 180 feet deep.

Mr. Jones: The map has no dimensions. It is 153 feet deep and 18½ feet wide.

5 The Court: That means inside measurements?

Mr. Roberts: I am quite sure that is outside measurements.

The Court: Be about 150 feet?

Mr. Roberts: I should say that would be about right.

The Court: 18½ feet wide inside?

Mr. X (tenant): I know that is the measurement, your Honor, 18½ feet.

The Court: How long does your lease last?

Mr. Rich: Four-year renewal—until November 30 1947.

The Court: It was taken away when?

Mr. Rich: By your order that was entered November 10, order to move November 17.

The Court: When was possession given under the order?

Mr. Rich: The order was entered November 11th, giving possession November 17, 1942.

The Court: You want to get paid for taking it away from you and ending your lease?

Mr. Rich: That is right. For all the improvements we put in, the expenses of moving, and for the expense we were put to in rehabilitating a new place, for the increased rent we have to pay in the new place.

The Court: What are you going to claim?

Mr. Rich: About nineteen hundred dollars.

The Court: Mr. Clay, in making your appraisalment—

6 ~~my~~ Mr. Clay: I understand no appraisalment has ever been made.

The Court: What is the matter with them?

Mr. Clay: I couldn't tell you.

Mr. Rich: We have talked with Mr. Clay on other matters. He has referred us to the real estate department of

the Army Engineers; they have referred us back to Mr. Clay.

The Court: Have you talked to anybody?

Mr. Clay: Yes, I have talked it over with the gentlemen over there; they say it is my job to appraise it. I have taken it up with Washington, and Washington says the War Department is supposed to do that. Still on the merry-go-round.

The Court: Let's appoint an appraiser. None of that has been appraised?

Mr. Rich: Not any of it—that is, of our four claims.

The Court: Who else is a claimant?

Mr. Jones: We represent 214 and 212. That is the Grocer Printing—that is the street numbers—W. G. Grimsdell. This is the north room, ground floor, known as Room 107 on the map.

The Court: What are its dimensions?

Mr. Jones: As deep as the other; it is a little over twice as wide; about forty feet wide, one hundred and fifty deep.

7 The Court: Before you try it, measure it and know for sure.

You have a lease?

Mr. Jones: We are month to month; been there twenty-eight years.

The Court: Always been month to month?

Mr. Jones: We have been for the last fifteen or twenty years.

The Court: How much time would you be entitled to? You would not be entitled to four years and a half?

Mr. Jones: We would be entitled to what we had to do to get new quarters. We took a new lease for five years in order to get any quarters.

The Court: What we are paying you for in this condemnation is what they are taking away from you. What are they taking away from you?

Mr. Rich: Under the tenancy from month to month we have been there approximately twenty-eight years. As to the future, the landlord wanted them to stay indefinitely and the tenant wanted to remain indefinitely, and was able to, and did pay the rent.

The Court: What is the government called on to pay you?

Mr. Jones: We think we are entitled to what we had to pay to get out of there—

The Court: Do you think that would be the measure of damages?

8 Mr. Jones: I think so.

The Court: Have you any authority on it?

Mr. Jones: Yes.

The Court: What do you say about it?

Mr. Clay: I don't think they are entitled to anything. I have filed a motion for summary judgment in this case.

The Court: I have written it "Month to month for twenty-six years"; they wanted to stay; the landlord wanted them to stay, and the government wouldn't let them.

Mr. Rich: That is right.

The Court: You had to move, you say?

Mr. Jones: Yes.

The Court: How much are you claiming?

Mr. Jones: Eleven thousand dollars.

The Court: You say they are not entitled to anything. That would raise a legal question.

Mr. Rich: That was a big printing establishment.

The Court: That is, where you had to move a lot of big machinery. Where did you move to?

Mr. Rich: Just up the street, on the other side, a block; had to take the whole building, and practically remodel the whole building.

The Court: Did you have to pay more rent?

Mr. Jones: Yes; cost about ninety-five dollars a month more.

The Court: What time do you expect the government to pay that for?

9 Mr. Jones: What we had to pay to get it—five years.

The Court: You will have to pay that as long as you stay there, then?

Mr. Jones: Whatever we had to pay to get it.

Mr. Rich: On the other hand, we could have stayed in the old building for longer than that.

The Court: You men are raising a lot of legal questions.

Mr. Jones: The answer sets it up in detail.

The Court: That is 212. Now, what next?

Mr. Jones: We have two more. Our next one is 224 to 226; that is known on the map as Room 104. The Grocer Printing is 107 on the map. This one is 104—Charles F. Wiggs, doing business as the Chicago Flexible Shaft Company.

The Court: Who will get the money?

Mr. Jones: Wiggs, doing business as Chicago Flexible Shaft Company.

The Court: On the map that is what number?

Mr. Jones: 104.

The Court: What are the dimensions?

Mr. Jones: That room is about forty-five or fifty feet wide.

Mr. Rich: At the front it is not as wide as at the back. The entrance stairway comes out.

Mr. Jones: The widest place it is forty-five feet, and the entrance comes out of the front—the stairway that goes upstairs.

10 The Court: How deep?

Mr. Jones: Part is cut off the back. Looks like it is about one hundred and ten feet deep.

The Court: You are not bound by these figures.

Mr. Jones: There is a scale here, but I have no ruler to scale it.

The Court: What sort of holding did you have there?

Mr. Jones: Tenancy by month to month. He had been there twenty-six years.

The Court: What is the measure of your damages?

Mr. Jones: \$3,100 dollars.

The Court: How did you create it?

Mr. Jones: By the expense of moving, the bonus for the new lease, and the increased rental.

The Court: Where did you move to?

Mr. Jones: Down on Fourth South, between Main and West Temple—a block and a half.

The Court: You say he is not entitled to anything?

Mr. Clay: That is right.

The Court: Which is the next one?

Mr. Jones: The next one south, 228 to 232.

The Court: Who owns that?

Mr. Jones: That is known on the map as Room 103. The Galigher Company is the tenant.

11 The Court: What are the dimensions?

Mr. Jones: Their room is the same depth as Room 104, and it is the whole corner.

The Court: 150, probably, by what?

Mr. Jones: By about 80.

Mr. Clay: 45 by 80, isn't it?

Mr. Jones: No; it is all in one room. I should say that is seventy or eighty feet wide, by a hundred and ten deep.

The Court: Get it correct before you try it.

Mr. Rich: That is the south end of the building, window-lights on two sides. That is 103 on the map.

Mr. Jones: Yes.

The Court: What sort of tenancy did you have?

Mr. Jones: Month to month. Been there eighteen years.

The Court: Who owns the building?

Mr. Rich: Mr. Richards—Mr. Roberts' client; he is likewise a defendant.

The Court: We made you move. What are you claiming?

Mr. Jones: \$4500.

The Court: Where did you move to?

Mr. Jones: Over on Motor Avenue and Second East.

The Court: Did you have any big machinery in there?

Mr. Jones: No.

12 The Court: Except your stock?

Mr. Jones: And our telephone system and our lighting system.

The Court: Anybody else in here?

Mr. Rich: That is our four clients—four of the defendants.

Mr. H. A. Smith: Gray-Cannon Lumber Company. 116 Pierpont Street, Room 100-102 on the map.

The building is on the corner. This was the west end of the building, facing on the south street. It contains approximately eight thousand square feet.

The Court: How wide and how long?

Mr. Smith: It is about fifty feet wide, about one hundred feet long.

The Court: What did they use it for?

Mr. Smith: Wholesale lumber business—Grey-Cannon Lumber Company.

The Court: Is that a corporation?

Mr. Smith: Yes. They operate a wholesale lumber yard with their office combined.

The Court: The lumber yard is not involved?

Mr. Smith: Yes, it was located in the building. They had to move the lumber out.

The Court: Did the government take it?

Mr. Smith: Didn't take the lumber.

The Court: Didn't take the lumber. Where was it stored?

13 Mr. Smith: The lumber was in the building itself. It is specially constructed so the lumber yard was right there.

The Court: What is your connection—your holding?

Mr. Smith: We had a lease that ran until the 31st day of July, 1945.

The Court: You claim you lost something by having to move?

Mr. Smith: We claim the reasonable rental value of the premises for the balance of the lease was \$9,120. We were unable to get any other place to operate the lumber yard, because there wasn't any other place that could be located, and we have claimed by reason of that we have had to discontinue the less-carload operation of our business, that was worth ten thousand dollars to us.

The Court: Consequential damages how much?

Mr. Smith: Ten thousand dollars for the loss of the yard portion of the business. It was necessary to sell material to move at less than the market value because of the short time we had, and the discount in the sale of some of the material in order to move was \$740.28.

The Court: Loss in business?

Mr. Smith: \$740.28.

The cost of moving was \$418.

We had in the building as improvements we were enjoying that went with the building property of the cost of \$1593. We had built our own improvements in the building, and they were part of the building, so they were lost to us when we moved.

14 The difference in the rental value of the offices alone between what we had to pay to get a satisfactory office and what our former office was for the balance of the time is \$704.

Some of these are duplications; depends on the measure of damages to be applied.

The Court: From your point of view what is the total of your claim?

Mr. Smith: As stated here, depending on the measure of damages, approximately twenty thousand dollars. We don't expect that much. If based on rental value it would be different.

The Court: Tell me what you are going to claim in the lawsuit. Do you know?

Mr. Smith: I would still say approximately twenty thousand dollars.

The Court: I will have to hear from you gentlemen as to the measure of damages. The constitutional provision is that you be paid just compensation.

Mr. Smith: As I say, we have fixed it on the difference of market value; if the court finds there is market value it may be \$9100 would take care of it. If the loss of the business, because there wasn't any other place available for that kind of business, that is ten thousand dollars. Actually, we are out of business.

15 The Court: Does the government have to pay consequential damages of that sort? It is taking property, you know. It takes your piece of land. If it had a crop on it, they would have to pay for the crop up to the time they took it. It wouldn't be matured, but would have a value. Suppose it takes a man's farm and they pay him for the growing crops and the market value of his land, and he has to move out in the street.

Mr. Smith: If your Honor finds there is market value of that property—I think it is not an element, but we have alleged it.

The Court: The Supreme Court has held recently you do not have to prove market value—

Mr. Smith: If they do that they measure it by substitute measures, in which event we are to be reinstated as we were.

The Court: Take into consideration its productivity, its rental value—a lot of things laid down. Better read that case.

Mr. Smith: I have read quite a lot of them. It is an involved situation because of the unique condition that prevails with the over-congestion.

The Court: It has just come down in the last month.

In your case I would say if you have to give up that place, you stop paying the rent and have to rent somewhere else—

16 Mr. Smith: There were no other places that could be had for a lumber yard.

The Court: Just compensation for the property taken. The property taken, in all these cases, would be a leasehold estate; it had a fixed value of a certain amount about which there is not any dispute, whatever rent you were paying. What they have taken from you is your leasehold interest, whatever it might be. Would they have to pay any more than the rent for the time your lease might be expected to run?

Mr. Smith: I think so. It is the value of the lease, if it can be arrived at—it usually would be the market value of the lease, reflected by the rental value of other property for the unexpired term.

The Court: It might be just the rental value of the property that you were paying.

Mr. Smith: If we couldn't get other property—

The Court: That is what I am getting at. Is that an element that can be considered as being proper to take.

Mr. Smith: If we can arrive at the market value of the lease, I would think it would be. If we can not fix a market value for the lease—

The Court: You could very well see, you might have a

lease on property for a hundred years, and maybe fifty years of it gone by. In the meantime that property has become the center of a town; that lease would be worth more than you were paying. If in a bad part, it
17 would be less.

Mr. Smith: In this situation, because of the emergency and the demand for space, we have such an abnormal demand you couldn't get facilities, which reflects a different reaction.

The Court: When was it taken?

Mr. Smith: On the 17th of November.

The Court: Suppose you had a lease for five years. If you put that lease up on the market you might not be able to get anything. On the other hand, it might be grabbed at—a hundred people want it—they would give you a lot more for it than you were paying. It might be it was in a neighborhood which had deteriorated and it would not be worth half as much as you were paying. Then what?

Mr. Smith: We have made inquiries. We can not get anything for less than four hundred dollars a month, for which we were paying one hundred and fifteen. That is the situation. When we couldn't get any other place, we discontinued our business.

The Court: Have you made inquiry so your witnesses could swear what the fair market value would be for a lease, to let somebody else have it? For instance, if your corporation ceased to do business, or if it was owned by an individual and he died?

Mr. Smith: No, we haven't done that. Our experts have analyzed other properties that might possibly be available, and are prepared to state what the rental value of those places was at that time.

18 The Court: Couldn't they just as well state what the fair rental value of this property would be if thrown on the market some way?

Mr. Smith: Yes; it would be four hundred dollars.

The Court: Isn't that the correct way to get at it?

Mr. Smith: I have set it up both ways. If it had rental value, that is what it was. If it did not have, these other things would be consequential damages.

The Court: Everything has rental value. You may not be able to determine it by proof of what the next door to it had rented for in six months, but its location and the business conducted in it, although there had not been a change in ten years, would be ground—I think that rule is well explained in that case. You read it.

What is the next number?

Mr. Clay: Mr. Brockbank is here.

Mr. Brockbank: 222 South West Temple is the street address. Upstairs, on the second floor—Brockbank Apparel Company.

The Court: What is the size of the room?

Mr. Brockbank: We occupied four rooms.

The Court: What is the full space?

Mr. Brockbank: We had about twenty-five hundred square feet.

The Court: How long and how wide?

19 Mr. Brockbank: About one hundred, by about eighteen wide. And another room—two more, in fact—one about eighteen by twenty, and one eighteen by fifteen, approximately.

The Court: How did you get in?

Mr. Brockbank: Through a common entrance on West Temple, at 222 South West Temple, a stairway.

The Court: Did you have a lease?

Mr. Brockbank: No, sir.

The Court: Month to month?

Mr. Brockbank: Yes, sir. Been there fourteen years.

The Court: Probably you could have stayed there if they had not moved you out?

Mr. Brockbank: I presume so.

The Court: What was your tenancy worth? How have you figured it?

Mr. Brockbank: I have only figured our moving expenses. I haven't added anything except that. We had increased rent.

The Court: What are you claiming?

Mr. Brockbank: Our moving expense was \$359.72 it cost us to move.

The Court: Where did you move to?

Mr. Brockbank: 50 West First South—right across from the Dinwoodie Furniture.

The Court: You claim in round numbers \$360?

Mr. Brockbank: That is moving expense. We went into a rental increase of six hundred dollars a year.

20 The Court: How much were you paying?

Mr. Brockbank: Three hundred dollars a year.

The Court: Over in this building?

Mr. Brockbank: Where we were on West Temple.

The Court: You were paying twenty-five dollars a month?

Mr. Brockbank: Yes, sir. Increased rental six hundred dollars a year, or fifty dollars a month. That is the old rental we paid.

The Court: When was this possession taken?

Mr. Brockbank: November 20, 1942.

The Court: Your line is what?

Mr. Brockbank: We manufacture dresses and uniforms. Have a factory there. Ladies' ready-to-wear.

The Court: In November of last year you were paying twenty-five dollars a month. If you had moved out what do you think your landlord could have rented the place for?

Mr. Brockbank: I don't know. It has been vacant for years, and been no decrease. Been so much space all those years.

The Court: Is there still other space there?

Mr. Brockbank: It is occupied by the government now.

The Court: You did not take all the second floor?

Mr. Brockbank: No, sir.

The Court: Anybody else take any of it?

Mr. Brockbank: I think the W. P. A. rented certain space on the south side of the second floor for mural paintings. They were there two or three years, I presume.

The Court: Do you know what they paid?

Mr. Brockbank: I don't know.

The Court: If they pay you anything at all they should pay you as much as you are claiming. You claim you don't owe him anything?

Mr. Clay: That is right.

The Court: I don't know whether you do or not.

The Court: Are you on the second floor now?

Mr. Brockbank: No, we are on the first floor.

The Court: That is better, isn't it?

Mr. Brockbank: Yes.

The Court: What is that marked on the map?

Mr. Brockbank: I haven't seen the map. It was 210 that was our entrance at the head of the stairway. 222 is the street address. And our entrance room number on the second floor would be 210. But we had torn out a partition—

The Court: Have you the map there?

Mr. Clay: It doesn't show the second floor.

Mr. Nelson: We represent the Petty Motor Company. They had a lease on the entire basement.

The Court: I am going to set all these cases for the 22nd. I want to hear the law questions before that time.

You better argue them. I do not have any idea what the measure of damages would be.

Mr. Clay: I am prepared. I think all counsel are prepared to argue it today.

22 The Court: I want to get through this particular phase of it before we argue something else.

Mr. Nelson: I represent the Petty Motor Company, which has a lease on the basement.

The Court: Have you answered?

Mr. Nelson: Yes, the answer is in.

The Court: You answered as an individual doing business under that name?

Mr. Nelson: My partner drew the complaint. It is shown as a partnership.

The Court: What is your store entrance number?

Mr. Nelson: 116 Pierpont.

The Court: That is a common entrance with who?

Mr. Nelson: With the Grey-Cannon Lumber Company.

The Court: Have you any number on the basement?

Mr. Petty: The entire basement.

The Court: How big is it?

Mr. Petty: About 150 by 180.

The Court: Includes the whole basement?

Mr. Petty: Yes, sir.

The Court: Under the entire building?

Mr. Nelson: That is my understanding.

The Court: What is the nature of your holding there?

Mr. Nelson: We had a lease for one year, ending October 31, 1943, with an option of renewal for one year.

23 The Court: What rent were you paying?

Mr. Nelson: A graduated scale averaging \$186 a month

for the year. The option of renewal was for \$165, but the first year rental ran \$186.66

The Court: Your renewal would be just for one year?

Mr. Nelson: Yes, your Honor.

The Court: How long had you been there?

Mr. Nelson: We had been there about half a month. From the 1st of November to the 24th.

The Court: Where did you move to?

Mr. Nelson: We moved all over the city. We had the basement rented to store a number of cars in dead storage. Under gasoline regulations we had to take them off the wheels and put them on blocks. When we were compelled to move we had to put the wheels back on, take them off the blocks, service them, and move them to various places. We scattered them wherever we could find temporary lodging.

The Court: How much rent were you paying?

Mr. Nelson: The first year, as I say, was a graduated scale, starting high and going lower—averaged \$186.66 a month.

The Court: What do you claim the government should pay you?

Mr. Nelson: We claim, first of all, the difference between that rental and the amount we will have to pay for stored vehicles at \$303 per month—the difference between \$186.66 and that amount for twelve months is \$1337.91. That is one item.

As another item we claim damage on the value of the renewal provision which we fix at \$264.

The Court: How do you figure that?

Mr. Nelson: We have taken the difference between \$165 a month, which is the renewal provision, and \$264; the difference between those amounts for twelve months—

The Court: Your total claim is how much?

Mr. Nelson: There are additional elements. The total claim is for \$2,291.91.

The Court: What other elements?

Mr. Nelson: Another element is the unused portion of the rent which we paid, and \$360, the cost of servicing and moving the cars.

The Court: That wasn't included in the \$1337?

Mr. Nelson: No.

The Court: What did that include?

Mr. Nelson: The \$1337.91 is the difference between the actual rent per month for the first year and the rent we will have to pay for the storage of the cars for the first year.

The Court: Have you figured out, instead of finding out what you would have to pay for some other building, what would be the fair market value if you sold your lease to somebody that needed the place as much as you did?

Mr. Nelson: I don't believe we have approached it from that angle.

25 The Court: Really that is what we are trying. We have taken away from you what your lease was worth for the use of the property.

Mr. Nelson: I don't think it would be any less. We might consider that element. I don't think he would have parted with his lease for that amount.

The Court: If you had to pay more when you moved somewhere else would you have to pay, if you started in on that day, when we took it away from you, relatively proportionally the same in increase? It strikes me, instead of finding out what you had to pay for some other building, find out what your building was really worth in comparison. I can see how that would be logical. So many elements to take into consideration if you moved to some other place. You might move to some other place that was more desirable, a better building, better located, or you might have got it at a lower rent, but in a neighborhood you would not want to be unless you had to be. You had to move. You had to go out and rent. You had to pay more rent. If you had to pay more rent somewhere else, wouldn't your lease be worth more than you were paying?

The standard is that somebody that wanted the property, and you were willing to sell it, part with it—you would not have to, either one of you—but suppose that motor company had gone out of business altogether, suppose it would be an individual who had died, and they wanted to close the estate—he had the lease. In that case you would
 26 have a lease there for sale. Considering the situation at that time, suppose that storage was being looked for everywhere, wouldn't it have had a value in excess of what you were paying?

Mr. Nelson: I think it would.

The Court: Find that out, not what you had to pay for some other place. You might not have been able to find a place this side of Tenth street down Main that you could have got for half this much, but your location is bad. That is not the measure of damages as to what this property might be up here in a fireproof building, maybe. I feel certain that will be the measure of damages.

That is true of all of you.

This gentleman that had to move from upstairs with his apparel company. He may have gone to First South on the ground floor and rented a place that cost him a lot more money, better located, on the ground floor, or maybe he couldn't rent a place at all, have to go out of business. But his place had a market value of some sort. He may be a lot better off where he is than over there.

It may happen, instead of your being injured you might be benefitted, and still be entitled to damages of some sort. You had to move. I do not know that moving can be considered. Could you consider moving independently of any loss or gain?

Mr. Nelson: I think it is one of the elements of general damage by reason of the loss of the lease.

27 The Court: How is it held in this state?

Mr. Nelson: I don't know.

The Court: I think we are governed by the law of the state.

Mr. Nelson: My partner dumped this matter into my lap this morning. I am not familiar with it except in a general way.

The Court: When do you want to argue this?

Mr. Jones: We are the only ones you have made a motion on?

Mr. Clay: On all of them.

Mr. Jones: Made a motion for summary judgment. We are prepared.

The Court: I haven't any opinion about it.

Mr. Jones: The courts have had the same trouble you are having now to determine what to do with it.

There is another matter. Mr. Clay has indicated before the noon recess that your Honor should have in mind the landlord's interest and the tenants' interest are all one. I think the landlord will object to that theory. So will we.

The Court: Who is the landlord?

Mr. Roberts: Willard B. Richards, Jr., and Alice Richards, his wife.

There are one or two other tenants in stores. I don't know whether they have answered. The W. P. A. has a shop in there.

28 Mr. Clay: They go out.

Mr. Roberts: Then the Herman Frock Company, and A. A. Hewitt at one time up there.

The Court: We are not worrying about them.

Mr. Clay: They have not appeared.

The Court: Have you served them?

Mr. Clay: Yes, They are in default.

The Court: Is the government taking this building, the title to it?

Mr. Clay: Just a lease on it.

Mr. Roberts: They have asked in their petition for condemnation of leasehold—three years.

Mr. Clay: Ending June 30, 1945, or terminable in 1944 or 1943 on sixty days' notice, or during the duration of the war, whichever is the longer.

The Court: They are not taking the title?

Mr. Clay: No.

The Court: Do you know what the total of your lease was—when they took it over—your income derived from the building?

Mr. Roberts: The total then was \$734.16 a month.

The Court: You had tenants that were satisfactory?

Mr. Roberts: Yes.

The Court: Some had leases beyond the time the government is asking to take it over. How much do you want the government to pay you?

29 Mr. Roberts: We have asked in our negotiations with the U. S. Engineers—we haven't filed an answer—

The Court: You have been trying to negotiate?

Mr. Roberts: Yes.

The Court: What do you think you ought to have?

Mr. Roberts: We think we ought to have six hundred dollars a month.

The Court: You are getting now how much—or were, when we put you out?

Mr. Roberts: \$734.16.

The Court: You are offering to lease it to them for how much?

Mr. Roberts: Six hundred dollars a month.

The Court: And they don't pay it?

Mr. Roberts: The thing that enters into it is the fact the government has spent seventy-eight thousand and fifty dollars on that building remodeling it. The question is how much of that goes to permanent improvements on the build-

ing—enhances its value. What we have been trying to work out with the attorneys and the real estate department of the Engineers is amortization of those improvements based upon the enhanced value they have given the building, and we have not been able to reach a settlement on that question.

The Court: Have I anything to do with that in this condemnation proceeding?

Mr. Clay: I think so. Under the condemnation statute your Honor would have to instruct the jury what they shall do about it.

30 The Court: Any Utah statute or Utah case on the matter of taking over property by leasehold? I don't know anything about it.

Mr. Clay: There is no Utah statute. This proceeding is based upon a federal statute.

The Court: I don't know that a federal statute has ever defined what is fair compensation.

(Discussion off the record.)

Mr. Roberts: We want all the permanent improvements left in the building.

The Court: They will have to do that with permanent improvements. The trouble is, any improvements they make that really add to the value of the property is one thing. That which is put into it for a particular use—they might take that basement partition out—

Mr. Clay: A question for the jury to determine what is the value of the improvements.

The Court: That may not be the question. May be a question to what extent has the value of the property been enhanced. The value of the improvements is no measure of that.

Mr. Clay: They may spend a hundred thousand dollars—may not be worth one thousand dollars.

The Court: They might spoil it for the use the owner would want to use it for.

Mr. Roberts: They have spoiled it for the use of a

31 general store building. They have removed all the entrances, and when we get the building back, if we ever do, we will have to tear out all the first floor and remodel it, at an expense of a lot of money.

—The Court: They have cut it up into little rooms?

Mr. Roberts: Yes. Torn out walls—two or three permanent walls. Cut doorways through some permanent partitions downstairs, opened up a row of low windows on the north end of the building. So, as a matter of restoration it may enter into this question that we have been damaged, that it will cost a good many thousand dollars.

The Court: They want you to pay how much on account of improvements?

Mr. Roberts: We have not been able to come to any understanding with them at all. They went in there and hired all kinds of help, worked them overtime, double time, worked nights, and they paid *exorbitant* prices for installation of electric lights and conduits upstairs and down; they had to tear out a good many partitions. They reconstructed portions so they could put in toilets, fifteen or twenty.

The Court: What are they doing with the building?

Mr. Roberts: The U. S. Engineers of the Mountain Division occupy it.

The Court: It is your client's contention, instead of adding any value to it for the uses you would have for it after they get out, their improvements are not worth anything, but are a detriment?

32 Mr. Roberts: That is right.

The Court: Are they contending you should deduct so much, at six hundred dollars a month, applied on the improvements they have made?

Mr. Roberts: No. Negotiations have reached the point that they have offered \$5100 a year for the premises, and then they want to amortize these improvements over a term of years. But we can not reach a value on those improvements.

The Court: What do they call the improvements—everything they have done?

Mr. Roberts: Everything they have done.

The Court: You say to convert it into a practical storeroom, a place of business for men engaged in business as these men were who were moved out, you would have to tear it all out?

Mr. Roberts: We will have to tear out partitions and remodel all the front, except one place, they have left the entrance as it was, but they have closed it up. They have only one entrance to that building—closed all the entrances. That will have to be remodeled. And they have torn down a number of partitions and cut it up into small offices with removable partitions about eight feet high, to make them private.

The Court: They would not be hard to move.

Mr. Roberts: No.

33 The Court: Did they put in new floors?

Mr. Roberts: No, but upstairs the floors were in fairly good condition, and all that was necessary there was to have those floors sanded. Instead of that, they go in there and cover the floors with plywood, little thin firwood, hardwood, forty-seven thousand square feet of it, and cover that plywood with linoleum.

As a matter of fact, it would have been much better to have sanded it and put down the linoleum. That plywood is expensive—several thousand dollars. They want us to amortize that through the period of this lease. That was of no permanent value.

The Court: Might be of some value for certain buildings. Might be all right if going to convert it into a rooming house or hotel.

Mr. Roberts: That might be so. But it would take a good many thousand dollars to remodel it into a hotel. It could be left as it is, and this space could be re-rented as it was before.

The Court: How many stories?

Mr. Roberts: Two.

The Court: Was there an elevator?

Mr. Roberts: No.

The Court: They did not put any in?

Mr. Roberts: No.

The Court: What do they use the basement for?

Mr. Roberts: They are not using the basement. There was a ramp that went down through the Grey-Cannon
34 Lumber Company into the basement. They closed that up and put in a floor over that ramp and closed the basement off, and they are using that space on Pierpont Street where the entrance went into the ramp.

The Court: They closed the entrance to the basement so you can not get in?

Mr. Roberts: That is right. One stairway under the entrance of the building that goes down to the basement.

The Court: What are you condemning that for?

Mr. Clay: I don't know.

The Court: Better dig a hole and open it up and let somebody use it.

Mr. Clay: Might do that, let the Petty Motor Company move back in.

The Court: What day do you want to argue the legal phase?

Mr. Clay: Any day you say.

The Court: I will hear you Monday morning, if you will get ready. I don't want you to say you have not had time to look the law up.

Mr. Jones: I understand on Mr. Nelson's and Mr. Smith's cases the government has simply moved to strike certain parts of their answer. In our cases they have moved for summary judgment.

The Court: It doesn't make any difference. All I am interested in is to find out what the law is.

35 Mr. Jones: You don't want to hear it today!

The Court: No, not today. I would rather give you a full day.

Mr. Jones: Do you want to hear us all at the same time?

The Court: In tandem.

Mr. Jones: Monday suits me.

Mr. Clay: And it is agreeable with me.

The Court: A motion to strike just raises the question what the measure of damages is.

Bring your books with you. Don't come over and tell me a book reads so and so.

Mr. Clay: I would like to have Mr. Roberts file his answer and get it in so we can argue this Monday.

Mr. Roberts: I have an answer in on our leasehold, but now that this question of improvements—

The Court: Put your answer in and claim whatever you want to claim or think you might be entitled to as damages resulting from taking over the building for this time. Raise any question you want to. It may be necessary to take evidence

Mr. Roberts: We answered their petition. Since that, all this other matter has developed, all these improvements have been made—

The Court: We will discuss it on the theory that they are making claim that you should pay for these so-called improvements. Your claim is, when they took the property over it was in a certain condition, and when the lease
36 expires you should get it back in practically the same condition, wear and tear excluded.

I would say Mr. Clay will contend when the government condemns a building for one or three or four years and make any sort of changes, they want to make you pay for it.

Mr. Clay: No, I will contend they can make any sort of improvements they want to, and that the owner, if he expects to own them after the expiration of the term of the lease,

will have to pay the reasonable market value of those improvements.

The Court: If he is going to assert he wants those improvements in there; but as I understand him, he is going to say he wants the building in the condition it was in when you took it. I will assume he doesn't want the building for the use you make of it.

Mr. Clay: Regardless of that, the measure is the reasonable market value of the improvements, what a stranger would pay for it.

The Court: That is what you will argue. You argue you can make any sort of improvements, make him sell it to somebody that wants it with those improvements, and make him pay for them.

I have my doubts about that being the law, that you can take people's property for three years and change the building around and say he has got to sell it and make the improvements.

37 Mr. Clay: They may or may not be of any value.

The Court: The question is, when you take over a piece of property and lease it and you make improvements that are called permanent, when you move out you can not take them away, as far as the law goes, but you are not entitled to get pay for them. That is the general rule. The general rule is, you can destroy property by making what you might call improvements for the use that it was available for, which the owner would not want to pay for—not only can you not get paid for those improvements, but you have damaged the property to the extent it costs him to put it back in the original condition.

Mr. Jones: There is another point—I don't think the landlord has been apprised of it—the government is going to contend that their job is to pay the landlord, and it is up to him to square himself with his tenants.

Mr. Clay: That is our contention.

Mr. Jones: That we have to look to him for our money.

Mr. Nelson: That is what the motions to strike are for

Mr. Roberts: That matter has never come to us, and is not in our pleadings. I didn't understand until today that that was Mr. Clay's contention.

The Court: That is the basis for his motion for judgment on the pleadings.

38 Mr. Clay: Not entirely. We shall contend that this must be tried as one case; that the jury must determine the value, the reasonable rental value of that building from the time we took it down to June 30, 1945. Whatever Mr. Roberts gets he will have to pay out to the other people.

The Court: You made them parties?

Mr. Clay: They are all here.

The Court: Didn't you make them parties?

Mr. Clay: Yes.

The Court: Why didn't you dismiss them?

Mr. Clay: Don't want to do that.

The Court: Then we wouldn't be bothered with them.

Mr. Jones: Before you conclude, there is this part of the matter I would like to get clear.

These cases are set for the 22nd. This morning your Honor set some twenty cases ahead of them that will take three or four days to try. And I have a matter in the state court—

The Court: You won't be reached for a week.

(Thereupon the further proceedings in said cause were continued to March 15, 1943, at ten o'clock a. m.)

March 15, 1943 10 A. M.

39 (Pursuant to adjournment the hearing of said matter on pretrial was resumed and the following proceedings had:)

The Court: We have this matter set for discussion—I won't say argument but for discussion—the Government is taking over for a period—I do not know for how long—have you any limit set on your occupancy?

Mr. Clay: Yes, expiring June 30, 1945 with the right, upon giving the proper notice, to terminate the lease in June 1943 or June 1944, and with the further privilege of extending the lease beyond June 30, 1945 should we still be embroiled in this war.

Mr. Jones: Has Mr. Roberts come over?

Mr. Clay: I don't know.

Mr. Jones: Mr. Roberts represents the landlord. I was wondering if the Government had come to any conclusion with the landlord since we were here the other day.

Mr. Clay: I don't know.

Mr. Jones: That would eliminate him from the case?

Mr. Clay: I think not.

The Court: What do you mean by that?

Mr. Jones: I was wondering if the Government had come to a settlement with the landlord.

The Court: What about that? What interest has the landlord?

Mr. Jones: The Government will make a contention here that will be very much—

40 The Court: You mean a tenant should settle with the landlord?

Mr. Jones: Yes.

The Court: Lets talk about that, if that is the way of it.

Mr. Jones: Before we begin, your Honor called our attention to a recent Supreme Court case and in that case the court very definitely answered an inquiry your Honor made of me. I think if we have that in mind at the outset here it will help us to more clearly understand our situation. Your Honor asked me if we weren't controlled by the laws of the State of Utah. I said we were only controlled by those laws so far as procedure was concerned. The Supreme Court in that case—that is the Miller case—said: "We need not determine" etc. (reads from the case) If the Federal statutes upon which reliance is placed require only that in condemnation proceedings the Federal Court shall

adopt the forms and methods of procedure offered by the law of the State in which the court sits—they do not and could not affect questions of substantive rights, such as the measure of compensation grounded upon the Constitution of the United States.

I think your Honor would be interested in that situation at the outset.

The Court: Is there any law determining how compensation shall be determined, outside of the opinion of the court?

41 Mr. Jones: Ultimately that is the test. The Supreme Court has said on many occasions that it is a judicial question and a judicial question solely to be determined in each case, but there have been rules set down and rules announced and applied that we think are helpful in the determination of the matter before your Honor.

The Court: Whether you as tenants are required to look to the landlord for the amount of damages resulting from cancellation of your leases.

Mr. Jones: I think that is a very minor point. The major point is whether—

The Court: Do you contend that?

Mr. Clay: Yes, your Honor.

The Court: Have you any authority on it?

Mr. Clay: I think so.

The Court: *Lets* have it right now. We are not making an argument here today; we are just discussing—too many of you to make arguments.

Mr. Clay: If your Honor please, and gentlemen, the case I have is reported in 53 Federal, second edition, at page 926. The title of the case is Carlock vs. United States. I will say to court and counsel I am reading from page 927. As I go along if I do not make myself clear enough you will know I am reading from that page. (Reads from case cited.)

The Court: Who is the owner of this building?

Mr. Clay: W. B. Richards.

42 The Court: Suppose the jury returned a verdict, in case you kept the property for one year and terminated the lease, that you are entitled to a thousand dollars a month; if you kept it for two years a fair lease would be \$800. a month; if you kept it for some other period of time, say five years, you would be entitled to \$600 a month, and so on. Then you have got the leasehold value determined in gross, as a whole. Mr. Grimsdell had a print shop; the Galligher Company had a machine business at one end of it; the Motor Company had all the basement—storage space. Now how would we go about apportioning it? Who would do it?

Mr. Clay: I think, if your Honor please, that would have to be worked out between the landlord and his *tendants*.

The Court: Your idea would be you would apportion it based upon the verdict of the jury as to the rental value of the whole property in such amounts as would fairly distribute through the building that thousand dollars, if it were a thousand dollars?

Mr. Clay: That is right.

The Court: Without reference to what they were paying at all?

Mr. Clay: Yes, because that would be part of the case. In other words, when the case is tried before a jury the landlord shows to the jury the reasonable rental value of those premises. If the tenants have to move out of course they do not have to pay rent in that building.

The Court: Do you know when you add up all the rentals of this building what it amounts to, any of you know?

Mr. Roberts: The rentals of that building amounted to \$734.16 a month.

43 The Court: With an item credited to each tenant?

Mr. Roberts: That is right.

The Court: In the trial of this case before a jury is it permissible to prove, either by you or by the Government, what the actual rental of these various tenants was so as to add them up?

Mr. Roberts: Yes, your Honor, I think that would be

competent evidence; that is, the income would be an element to determine what was the reasonable rental value of that building.

The Court: Then we would get that. Suppose the jury said the reasonable value of this property on these various rentals—some of them are from month to month, some are for a period of time—but we will adopt that and say the rental value of all this property is worth \$700, and then I would leave it to them and they would distribute it according to what your rents are—do you understand that in a case of that sort the jury would return a verdict for the Motor Company, for instance, for a certain amount?

Mr. Clay: Not unless the Motor Company had some special damages of some kind. If it did it would be—

The Court: Are you setting off against your special damages?

Mr. Clay: Yes, I think so. For example, suppose the Motor Company as a part of the consideration of the rent made certain improvements which enhanced the reasonable market value of that building, the landlord would
44 have the right of course and duty to present to the jury the condition of this particular store, that there were certain fixtures or improvements in it which made it worth so much rent. I do not agree with Mr. Roberts that what these tenants are paying is admissible. The only question is the reasonable rental value of this building, regardless of what they were paying. Under their lease they might have been required to pay more than the reasonable rental value; under their lease they might have been paying considerably less than the reasonable rental value. The question is what is the reasonable rental value of that building.

The Court: That is true, but do you say the amount of the rents being paid would not be competent evidence to go to the jury?

Mr. Clay: On cross examination we might show that in our favor.

The Court: You might show anything on cross examination possibly.

Mr. Jones: We are getting off on the wrong question. Reasonable rental value is not the test at all. It is the reasonable market value of the lease, if there is a market value. If there is not any market value then the courts, including the Supreme Court of the United States, have told us what other rule to adopt.

The Court: What rule would you adopt? I was seeing if I couldn't get an agreement between you people that the fair rental value of that property is the rents that were being paid and what each one of you was paying, so far as rent is concerned, would be reasonable.

45 Mr. Jones: I would adopt the rule the Supreme Court has said, that the tenant, the owner of the property must be made pecuniarily whole, and that the test is what has he lost?

The Court: You are getting off of the special damages.

Mr. Jones: No, I am getting off of the measure of damages. That is where the confusion has arisen, that there is a specified, definite measure of damages, and there is not.

The Court: Do you claim the rent had nothing to do with it?

Mr. Jones: Oh yes, I claim as a distinct element, and it is only an element, because rental value—

The Court: All I want you to say is whether you concede the rent being paid or received, in the trial of this case would be proper evidence to be introduced by anybody that wanted to.

Mr. Jones: Absolutely; cannot arrive at it without it.

Mr. Clay: I concede that, if your Honor please.

The Court: So say you all?

Mr. Roberts: That was my contention when I gave you that; it is one of the elements.

The Court: So say you all, that the rent being paid and received would be evidence to be given and considered by the jury.

46 Mr. Clay: I think so.

The Court: All of you agree on that?

Mr. Clay: I do.

Mr. Jones: Your Honor, there is a matter I should have called your attention to when I read this citation from the court. I don't know how the other defendants are in here but we are in here on a motion for summary judgment, and I think the record should be straightened out at this time because in this proceeding there is no such thing as motion for summary judgment; such a thing is unknown to the procedure in this State. If the Government is demurring to our answer and the record will show that the motion for summary judgment is being considered as a demurrer to the answer, then I think the record will be clear, but on a motion for summary judgment there is no such thing.

The Court: Lets discuss what we are considering after we find out what we are considering.

Mr. Jones: I just wanted that point in the record at this time.

The Court: Now then, having put before the jury the rents being paid by the tenants and the rates being received by the owner, you would be inclined to rest wouldn't you?

Mr. Clay: Yes.

The Court: However, you might call a witness to testify that that is too much, the reasonable value was less. You would not call a witness to prove it was more than that.

Mr. Clay: That is right.

47 The Court: But you put your evidence in last.

Mr. Clay: That is right.

The Court: The owner would put in his evidence. Possibly he might put in evidence by experts that he was entitled to more than it was worth, more than when the property was taken. When was it taken?

Mr. Roberts: On the 10th of November, 1942.

The Court: That was after all these war measures and activities had begun.

Mr. Roberts: That is right.

The Court: He would say what it was when they took over this property; he could have rented this property, and can prove it by any number of real estate men, for a lot more than he was getting. Would that be competent evidence?

Mr. Jones: Yes.

Mr. Clay: I think so.

The Court: When he did that he would rest as far as he was concerned. Now which one of the tenants—we have already got in evidence the rent he was paying—who is it you represent?

Mr. Jones: The Grocer Printing, that is Grimsdell; Gal-
ligher Machinery—

The Court: You contend that your clients are entitled to special damages in addition to having their rents cancelled?

Mr. Jones: Yes.

The Court: That is to say, if they had nothing more to do than to cease paying rent, and that is all there is to it, they just as well be out of court.

48 Mr. Jones: Certainly.

The Court: They would cease to occupy the premises; they cease to pay rent; if that is all the damage there is they are compensated when they cease to pay.

Mr. Jones: If that were true, if that was the right principle, that would be true.

The Court: That might be true—

Mr. Jones: Sometimes, yes.

The Court: Might be true a person could move next door and get a better place.

Mr. Jones: I can see that that is true.

The Court: You would claim naturally that under the conditions existing your rent was so and so but you couldn't equal that and stay in business; if you have to move and

continued in business you would have to rent another place. Now would you prove that by proving what you had to pay for another place equivalent or practically the same, or would you prove it as an independent proposition that the property, when your lease was cancelled, the rental value was more?

Mr. Jones: The courts reach the problem both ways. Some of the courts try to hold to market value and say when there is no market value, as an element to determine what the market value is you can take into consideration what the cost was otherwise, but you cannot consider that cost as an independent element of damage but only consider it as an element in the value of the lease. But it seems to me that is quibbling and it is a direct damage. But we contend it is admissible on either theory and reaches the same result, no matter which one is adopted.

49 The Court: For instance, Brockbank, manufacturing women's clothing, he was up there and paid very little rent and he moved over on First South, got a place over there; I do not know what rent he is paying, undoubtedly more than—

Mr. Jones: I think he said \$50 a month.

The Court: What would you try to prove if you represented him? What do you think he would be entitled to prove?

Mr. Jones: Not knowing his circumstances I would be at a handicap to say. From what I heard him say the other day here I think what there would be in his case would be what has he been damaged. Then taking your Honor's statement to him the other day: aren't you better off on the ground floor than upstairs, you bring in the other element, what have you been benefitted?

The Court: So the fact he might have to pay more rent would be just one item in the consideration of his damage.

Mr. Jones: It is only an element.

The Court: You say, as I understand it Mr. Clay, we would not hear that at all?

Mr. Clay: That is right; it is a consequential damage.

If he didn't have a lease—month to month tenant—he would be subject to eviction by his landlord at any time.

Mr. Jones: The Government cannot take that position.

50 Mr. Clay: He could not any more claim damages from a stranger than he could of his landlord. If he had only a verbal month to month tenancy he had no property in that building at all—no property right that had any value.

Mr. Jones: If Mr. Clay will cite me, or your Honor, one case that sustains that, I will agree with him. There is not one case in the books that sustains him.

The Court: Have you been able to find any case at all on the subject?

Mr. Jones: Yes, plenty of them.

The Court: Have you got them here?

Mr. Jones: Yes.

The Court: They are what talk. I would rather have them speak than hear you people talk.

Mr. Jones: I would too. State vs. Northern Pacific Railway Company, *decided* in 1931 by the Supreme Court of Montana, 295 Pacific 257, at page 261—

Mr. Clay: May I say this to court and counsel before Mr. Jones proceeds, that we shall contend that the authorities of the State courts are not in point, for this reason: most Constitutions of the States provide property shall not be taken without paying damages, whereas in the Federal Constitution there is no reference to damage but only to pay just compensation for the taking of the property, and we shall contend that wherever there is damage allowed by State Constitutions it includes consequential damages and not a damage directly resulting from the taking of the property, for which reason we think the State Constitutions and the cases under them are not pertinent.

51 The Court: You would claim in condemnation, as here, by the Government the provision in the Utah statute, for instance, that damages may be considered and allowed for damage resulting to outside or other property could not be considered?

Mr. Clay: That is right.

The Court: Or, the converse, that benefits accruing outside could not be considered.

Mr. Jones: I don't know what he contends. Do you contend that?

Mr. Clay: I don't know what the court means by "benefits".

The Court: The Utah statutes, as I recall, provide for damages to property; provides for benefits too, doesn't it?

Mr. Clay: The constitution just provides for compensation for the taking; the Federal Constitution just provides for compensation for the taking only.

The Court: That is to say, you cannot consider other or adjacent property?

Mr. Clay: That is not what I have in mind; I mean resulting damage.

Mr. Jones: Mr. Clay cannot contend it doesn't include damage because the Supreme Court expressly held it does. Our case isn't that case at all. Our case is a case of the taking; they have taken our lease and our property. What we are determining is what is just compensation and that has been held to include what he says you cannot hold. I am not talking about consequential damages; I am talking about direct damage—

52 The Court: Lets find out what we are condemning. I am not talking about the law of the case. Are they condemning your leasehold interest?

Mr. Jones: Yes, they took it.

The Court: Specifically?

Mr. Jones: They took it, yes.

The Court: How did the petition read?

Mr. Jones: That they be given immediate occupation.

The Court: What does it say about the leasehold interest? Anything?

Mr. Jones: That is all; that they be given immediate occupation; we be forced to vacate.

The Court: And they mention who you are and what your interest is? I was trying to find out on the face of the complaint what—

Mr. Clay: We contend they didn't have a leasehold interest.

The Court: Some of them have I suppose

Mr. Clay: Mr. Jones' client didn't—

The Court: I am not talking about any particular one. Lets see what you are condemning.

Mr. Jones: The case is entitled United States vs. .7 of an acre of land. In the first paragraph they recite the authority of the Act of Congress under which they are proceeding and that the Secretary of War has requested the Attorney General to proceed against this property which they say is described in exhibit A; that is a map showing the three floors, the basement, main floor and second floor.

53 The Court: That shows the building?

Mr. Jones: That shows the building. (Reads from complaint.)

The Court: Anywhere in the complaint does it require these various parties to come in and show their interest?

Mr. Jones: (Reads prayer of complaint) Now on that prayer the court issued a citation; we were all brought into court and the court had a hearing and gave an order of immediate occupancy.

The Court: Has the owner and have the tenants filed answers here setting up their various interests?

Mr. Jones: Yes, that is right.

The Court: What do you pray for?

Mr. Jones: We pray for damages—you mean in money?

The Court: I suppose so.

Mr. Jones: We pray for \$11,000—

The Court: No, I am not interested in the particular amounts.

Mr. Jones: We ask for damages and just compensation.

The Court: That is, for what?

Mr. Jones: For the property that has been taken.

The Court: For your interest in the property.

Mr. Jones: That is right.

54 The Court: Your interest in the property would be one thing, for different parts of the property. You say your particular client asks for \$11,000; which one is that?

Mr. Jones: That is the Grocer Printing.

The Court: Do you claim anything because of the cancellation of your lease, being an adjusted one?

Mr. Jones: Yes.

The Court: How much?

Mr. Jones: We claim that the damage for that is around \$6,000.

The Court: That is to say, that your lease was worth that much money?

Mr. Jones: That is right—that is in round numbers.

The Court: How do you think you should go about proving that?

Mr. Jones: We will prove that in this way, that we had a going business at our location, that we had been there for 26 years, that the landlord had told us he desired us to stay there and we did desire to stay there; that our business was profitable, that we were deprived of that, and in order to carry on our business and minimize our damages we were forced to seek another location—

The Court: Let me interrupt you. Yours was month to month. Would it be permissible for you to call your tenant and prove by him that he was satisfied with the location, been there 26 years, and that it was his desire to remain there at least as long as the Government is seeking to hold this property?

55 Mr. Jones: That is right.

The Court: Would it be also permissible for you to call the Richards and prove by them they were entirely

satisfied with you as tenants and had been for 26 years and so far as you were concerned and he was concerned you could remain there indefinitely, certainly as long as the Government—

Mr. Jones: Not only prove that but prove before we ever knew the Government was coming in the landlord had come to us and asked us if we wouldn't stay.

The Court: You think that would be competent evidence?

Mr. Jones: I do.

The Court: To carry you over the Government term at least, up to 1945?

Mr. Jones: Carry it further than that.

The Court: That would be an item we would call the value of the leasehold?

Mr. Jones: That is an element. I don't think that is the measure of the value of the leasehold; that is an element.

The Court: That is one item.

Mr. Jones: That is one item. The other item is we had a business there that required special facilities on the leased premises, heavy machinery required special foundations; we had put those special foundations in; we had made permanent improvements there and that in order—

56 The Court: Wouldn't that item be properly covered by your damages resulting from loss of your lease?

Mr. Jones: That is what I say; this element of rent is only one item.

The Court: What other item have you in addition to the \$6000? What other items have you?

Mr. Jones: That is what I am saying; one other would be this—having shown that—that in the new premises in order to use them at all, in addition to the increased rent we were required to pay, we had to install those same things in the new property in order to hold our machinery, in order to have a business there; we had moving expense that was a direct result of this taking of our lease.

The Court: You said \$11,000. For moving what have you got?

Mr. Jones: I have forgotten the exact item; we will say for the purpose of discussion that it was \$3,000—it is not that much—

The Court: Cost you \$3,000 to move and get your plant properly installed in this new place.

Mr. Jones: That is just moving; cost us an additional sum to get it installed.

The Court: What?

Mr. Jones: We will say it cost us \$2,000.

The Court: Have you any other item except the moving and installation?

Mr. Jones: In the cost of moving we will show that we had to use our employees, that their time was exclusively spent not in our business but in our moving, and that will be included in the item of \$30000, if that is the sum.

57 The Court: That is, while moving you were out of business and you had to pay your employees just the same.

Mr. Jones: That is right.

The Court: But you are not claiming on account of having to move, not being able to do any business for a month, you are not claiming loss in profits?

Mr. Jones: No—there is a point right there, might as well bring it out now. Courts uniformly hold loss of profits is not an element because they are too remote, but there are cases that say in considering this element of market value you may show volume of business in order to show that the business was a profitable business; otherwise you might have had a benefit, that you were running a failing business, as they did in one case in Michigan, it was an actual benefit to the tenant to be relieved of his lease. So we will show that we did run a profitable business.

The Court: That would go to your leasehold interest.

Mr. Jones: That is right. We don't claim anything for loss of profits.

The Court: As you analyze your case you would claim you were entitled to recover the value of your leasehold interest and that would include the installations that you had made to make the property available for your uses, and that you had put in a number of things that were necessary to carry on your business, concrete foundations for instance, all that sort of thing, which naturally would become
58 part of the building, and that you are entitled not only to the value of your lease, your occupancy for the term of this taking, being deprived of it you would be entitled to \$6000; in addition to that you had to move and install your machinery and so forth at the new place, at a different rent.

Mr. Jones: That is right.

The Court: Do you claim you would be entitled to anything on account of that?

Mr. Jones: That is where we fix the \$6000 as the value of the lease because the only thing comparable we could get—and it is not comparable—it is not as good as we had—we had to pay that additional rent, so it was of that much value to us.

The Court: Couldn't get anything any cheaper; therefore your property would be certainly worth that additional amount because of your business.

Mr. Jones: Surely; that is right. Right there, your Honor, there are one or two courts—in fact in one State there is a statute—that say your moving must be within a reasonable distance. That won't enter into our case because they were all moved within a block or two. For instance in one State, I think it is one of the New England States, the statute says your expense of moving can only apply to moving within the State.

The Court: Is there any statutory provision in those States that allow for moving, covering it specifically?

Mr. Jones: Just one, that is one of the New England States; the other courts allow it as direct evidence of the measure of value, market value of lease.

59 The Court: Any Federal court ever allowed these moving damages?

Mr. Jones: Yes, a district court.

The Court: Where? What do they say about it?

Mr. Jones: It is the District Court of the Eastern District of Pennsylvania, and that case was decided in 1921, found in 275 Federal Reporter at page 218, National Laboratory & Supply Company vs. United States.

The Court: Is that a District Court case?

Mr. Jones: Yes. I don't find it was appealed. Apparently everybody was satisfied with what the court did. The court allowed the cost of removal, including the expense of installing the business in the new place. (Reads from the citation.)

The Court: Does the court reason the case at all?

Mr. Jones: It says this: (Reads further from the case cited.)

There is another Federal case where the situation is *analogous*; this is a Circuit Court case, the 8th Circuit, decided in 1933, and again affirmed by the same Circuit on another case in 1936, and this last case was appealed to the Supreme Court of the United States and certiorari denied. In the first case, the Wheeler case, U. S. vs. Wheeler, found in 66 Federal (second) 977—(reads from the case cited.)

U. S. vs. C B & Q RR, 82 Fed. 2nd, 131—

The Court: I do not believe I care for your discussion from that standpoint. Now the situation stands here like this: the owner of this property, or the owners—and you represent them I believe Mr. Roberts?

60 Mr. Roberts: Yes, I do, Judge Johnson.

The Court: Do you claim that you are entitled, under the construction given the language "just compensation", to any more than you were getting or would have gotten if you had not been bothered?

Mr. Roberts: We contend this: that we are entitled to the reasonable market value—

The Court: I understand that, but concretely answer me this: do you claim that you would be entitled to any

more than you would have gotten if the Government had not taken over this property?

Mr. Roberts: Yes, we claim this: there was one store building vacant; there were a number of rooms upstairs that were vacant, and we claim we are entitled to the reasonable rental value of that property which the Government has now taken over—

The Court: That additional area?

Mr. Roberts: Yes, that additional area.

The Court: How much are you claiming that would add to your income that you had rented?

Mr. Roberts: That is not in our answer; we have figured it out but we haven't put it in our answer because of this new condition which has arisen since the original answer.

The Court: *Lets* not bother about your answer. What I am getting at now is to settle what the issues are or will be if this case is tried, so far as the owner is concerned. I will say to you quite frankly it strikes
61 me if you are made whole with respect to the rent you were receiving, and are given a reasonable rent for that that you did not have rented, you haven't any complaint to make.

Mr. Roberts: As far as rental is concerned that is right.

The Court: That is all we are trying here, is what your rent would be. Of course, Mr. Clay, the situation here presents this sort of anomaly, you take over the property for the leasehold period and you pay all that the property is reasonably worth as a rental value, *lets* say \$800 when you add in that that was not rented and that you are using. You are paying for all the property and the use of it to the owner. Now that would seem to indicate that that ought to end the claims made upon the Government to pay anything. They are paying all the property is worth, and I suppose maybe that is the basis for your contention of looking to the owner, but it develops you are condemning here not only the property and its use by the Government as such and its physical possession, but you are condemning what is claimed by the defendants here, some of them, to be a leasehold interest that each one of them claims to

hold, and damages resulting to them from having to move and get other places. When you add that up and divide it by the month that might double your \$800. In other words, when you add the value of the lease to these defendants, and they are entitled to damage for moving, it could easily add up more than the rent you are paying for the property as a whole to the owner. The only way to avoid that is to make the contention, as you do, that they haven't any interest after you condemn the property. Do you make that contention?

Mr. Clay: That is right.

The Court: Have you anything to support that sort of contention?

Mr. Clay: Yes.

The Court: What is it?

Mr. Clay: I have a number of authorities here and I have the books here. The first case I am going to read from is United States vs. Myers, reported in 190 Federal 688 (reads from case cited).

Also 39 Fed. Supp. page 91 (reads from syllabus).

Also 262 U. S. 675, Joslin Company vs. City of Providence. I don't have the book here; I just have an excerpt. (Reads excerpt from the case cited.)

Also Gordon Bros. Company vs. United States, 284 Fed. 849; I will read from the note I have. (Reads.)

Also 66 Fed. 2nd Ed. page 215 (reads from note on this citation).

Mr. Jones: May I ask Mr. Clay a question? This case holds squarely you cannot condemn a chattel. Are you claiming that here?

Mr. Clay: We are not condemning a chattel.

Mr. Jones: That is the only point in that case. The court says specifically the only thing that can be condemned is real estate. Do you make that contention?

63 Mr. Clay: No.

Mr. Jones: Then the case is not in point.

Mr. Clay: Let me tell you what the case holds. In this case the United States condemned a building and the tenants wanted to be paid for *unscwing* and unbolting certain heavy machinery and moving it away. That is the only question the court decided, saying the Government would not have to pay the expense of unbolting that machinery and the labor for removing it. Then they said if this machinery had been such an integral part of the building as to constitute realty, then the Government would have to pay for it. (reads from the citation) In other words, the claimants were contending that this machinery formed a part of the realty and the court held it did not and *henace* would not have to be paid for.

The next is 85 Fed. 2nd Edition, 243, at page 249.

And Mitchell vs. United States, 267 U. S. 341 (reads from note on this citation).

That is all the authorities I have. I take it your Honor does not want any argument.

Mr. Jones: Now ~~your~~ Honor, I would just like a word or two on these cases. In the first place, as it seems to me, Mr. Clay entirely misconceives the cases; I don't read them as he does at all. In every case he has cited—

Mr. Clay: May I interrupt, if the court will permit me I wanted to call attention to 275 Federal; that is the only Federal court that has been cited in which they apparently allowed for the cost of removing of fixtures (reads from the case).

64 Mr. Jones: They didn't apply it because as the Federal court said in the rate case and the railroad case they couldn't apply it. This Federal case Mr. Clay cites, 66 Fed. (reads from the case).

The Court: Does the Act of Congress authorizing this proceeding include a leasehold interest?

Mr. Jones: Oh yes.

Mr. Clay: If Mr. Jones understood me to say we were condemning chattels I say we were not; we were condemning real estate.

pation. One is that the tenant must get out, and if he is in business he must find a new place in which to do business.

There may be, as in this case, a measure of just compensation to the tenant based upon what rent he is paying, but I can very well see that the rent may not be full just compensation for the deprivation of the use of the property. It is a mere play upon words to say that his right to continue to occupy the property is determined by what he can get another place for, or what he might have to pay to move, or even to say that he might lose profits on his business.

So really it becomes a question of what sort of evidence should be taken and considered by the court and jury to determine what just compensation would be to these several tenants in being deprived of the further use of the property, and required, necessarily if they stay in business, to find another place in which to do the business.

69 One way to determine that, the one you gentlemen have argued, is to add together what it has cost to move and to install his property at some other place, taking into consideration what might be the difference in the rental value of the property subsequently occupied. I have my doubts about that being the rule in such cases. Take Mr. Grimsdell's case: he was in the printing business; he had his plant there; it was all established, in position, and was being used. Suddenly he is deprived of that right of occupation and use, and if he stays in business he is required to move. Aren't those premises worth more to him than the rental value because of that particular situation? How much is Mr. Grimsdell's place worth in addition to the rent he paid, because of his installations and because he was located there? It is his business and it is his location. He cannot recover for loss of profits, but he is deprived of the location where he was doing business; he had his plant established, printing presses all built on foundations, and these things he put in himself. He is not paying Mr. Richards for this situation that he has created himself. Now if it is true that he is damaged in respect to the taking of this property, it might be what it cost him to move would measure his damage, but I can very well see where it would

not; the location would be different; you know where to find him, and have known for twenty-six years. You may not know where he is now. I have known of his place ever since I have lived in Salt Lake, and before, but I do
70 not know where his place is now, except as you gentlemen tell me.

I am simply suggesting to you that I have my doubts about this idea that you can recover from the Government what it cost you to move. That is a very indefinite way to put it. It might cost one man \$300. to move and another man \$500. It maybe if he knew the Government would have to pay for it he would not be particular about what the cost might be.

Mr. Jones: I think it has to be a reasonable distance, and proper cost for the actual things that are necessary in moving.

The Court: If those things are necessary and he has got them in his building, isn't it worth more to him located there than it would be in some other place that he might find? On the other hand, it might be an advantage to him to have to move and get another location.

Mr. Jones: That is just an element the jury may consider one way or the other in fixing value.

The Court: Logically I would say, the Government having taken his right to occupy the premises, it necessarily follows he would have to move—

Mr. Clay: He didn't think enough of a right to enter into a lease.

The Court: That is true enough. That might be an element that would be considered; but he had a right
71 to occupy it the day you took it.

Mr. Jones: That is jury argument.

The Court: It might be he would occupy it—had the best chance to occupy it, having been there twenty-six years, and his father before him. I think that would be a question for the jury. We are not here condemning a lease, in any proper sense; we are condemning the right to the occupation and use of property.

Mr. Jones: (reads from the statute).

The Court: The statute is broad enough to cover this proceeding?

Mr. Jones: Yes. (Cites and reads from 67 Law Ed. 1014; 87 Law Ed. 251, 266 U. S. 149, 69 Law Ed. 216.)

65 The Court: The motions of the Government before the court necessarily raise the question of the sort of evidence, if any, which should be heard and considered by the court and jury at the trial of these cases.

Incidentally, as between the Government and the owner of the building, it has been suggested that the value of improvements already made or which may hereafter be made by the Government, or the damages resulting to the owner by reason of the changes so made, ought to be taken into consideration by the court and jury at the trial.

66 Mr. Clay: I would like to suggest, and I think it can be done, that at this time we pay the owner—that is the only question we have up now—the reasonable value of the use of the premises, and that the court retain jurisdiction of the case to determine the value of the improvements to the owner, if any, at the time that the building is turned back to the owner, and in that way we won't have to go into a lot of speculative questions.

The Court: If counsel so stipulate, that question will be postponed for further consideration and determination.

As between the Government and the owner of the building it is my view that reasonable compensation to be paid by the Government to the owner for the occupation and use of the building, generally speaking should be the rent being received by him from his tenants, plus the reasonable rental value of that part of the building not heretofore rented, plus any financial loss which he may sustain through the removal of his tenants and his probable inability promptly to secure the same or other tenants to occupy the building after the Government has surrendered possession—this situation arising out of the indefiniteness of the Government's occupation and possession of the premises.

As between the Government and the several tenants who

are dispossessed, what should be the measure of their recovery?

67 It is my view that in no practical sense is the Government condemning leases. The Government is getting exactly the same result whether these tenants have a term lease or not. Some of them were occupying the premises from month to month; they did not have a written lease at all; others have; but in either case the tenants had possession; they had the exclusive right of occupancy as against the owner which he has assented to, in one case for twenty-six years. Have these month to month tenants no interest in the occupancy and the exclusive right to the occupancy of the portion of this building which they occupied?

What the Government is seeking as against these tenants is not in respect to leases. It is not interested in whether they have leases or whether they have not. It is interested in the possession of this property, all of it, as against each one of these tenants, the exclusive possession, that is, to put the tenants out and to put the Government in. This proceeding involves the right of the tenants in the property—as the statute says, any interest in the property.

So it seems to me the way to view the situation is that the Government is condemning the right of occupancy of these tenants—taking the occupancy of the tenants away from them and giving it to the Government. Now that occupancy has a value to all these tenants. It might possibly be determined that in the case of a month-to-month rental it was less valuable, because more uncertain, than that based on lease from the owner for a specific term; but still when the Government took possession of this building it
68 deprived these occupants, lease or no lease, of the right of occupancy.

The crucial question that you men have been discussing here is: What is the measure of just compensation for depriving these various tenants of the right to occupy the parts of the building they were occupying?

Of necessity when you deprive a tenant or owner of the right to the possession and occupancy of property, there are certain necessary results following such forcible occu-

Mr. Clay: I think we are condemning a lease in so far as these tenants are concerned who had a lease.

The Court: We are taking away from him his right of occupation that is measured, in certain cases, by a lease.

Mr. Jones: You don't say if we have a year's lease, they can come back at the end of the year and kick us out entirely?

The Court: The owner cannot throw his tenant out if he occupies the premises under a lease, during the term for which it was let to him; but it does not follow that because the tenant does not have a written lease with a specific term, if the Government puts him out of the premises which he is occupying, and which he may or may not occupy in the future indefinitely, that the Government does not have to pay him anything.

Now I am inclined to say at present that the proper measure of damages to be recovered as just compensation by these tenants who were occupying these premises,

72 is not to be determined by whether they have a written lease, or any lease; not to be determined by what it may cost them to move, or what extra rent they may or may not have to pay; but it is to be determined by what that right of theirs to the occupation of these premises for the period determined, or which may be determined by the jury—what would be fair compensation, taking into consideration that they were established there, had been there in some cases for years, that they had proper installations all made, and that it was occupied by a business that was well known in the community, that people knew where to find them, and all that sort of thing, rather than the uncertain cost that might result if you base their right of recovery upon removal, or on a re-renting basis. If you accept a re-renting basis you have to take into consideration the location of the new place, how big a place it is, what sort of building it is, how it is located in its surrounding; and we are really trying then the question of the new location, rather than trying the value of the old location.

What are these tenants entitled to recover for being deprived of the right to continue the occupation of these

premises and to enjoy whatever is incident to such occupation?

Mr. Jones: I think that is absolutely right. The only question is: how are you going to give any evidence to the jury of what that is worth unless you give them the evidence of what is taking its place?

73 (Mr. Jones reads from instructions given in case cited from 198 NW 486.)

The Court: Primarily what you are trying to find out is the value of the right to occupy the premises.

Mr. Jones: That is it. That is the only way we can find it out—what took its place.

The court: Well, gentlemen, I guess you have told me all that is worth while to consider today. My present view is along the lines of the instructions to the jury just read by Mr. Jones, but I do not want you to understand that you have the right to prove, independently of any other connection, what it may have cost your client to move. That is an element that must be tied in with the value of the right of occupancy.

Mr. Jones: That is right.

(Following here are ruling on plaintiff's motions to strike and for summary judgment, and exceptions thereto.)

(See next page for same.)

74 Mr. Clay: I take it our motion for summary judgment against Charles E. Wiggs doing business as Chicago Flexible Shaft Company, is denied?

The Court: Yes; we will leave it to the jury.

Mr. Clay: May the record show an exception.

The Court: Any other motion?

Mr. Clay: Yes; I have asked the court to pass on all the motions; motion for summary judgment against the Galligher Company, a corporation.

The Court: Yes.

Mr. Clay: Is that denied?

The Court: They maybe denied in each.

Mr. Clay: May the record show an exception, please.

The Court: You men get your answers in.

Mr. Jones: Ours are in except in the Flexible Shaft; that will be in at once.

Mr. Clay: The motion for summary judgment against W. G. Grimsdell doing business as Grocer Printing Company is denied?

The Court: Yes.

Mr. Clay: Exception to that. Motion to strike and for more definite statement in the Gray-Cannon Lumber Company case—

The Court: I don't know anything about that.

Mr. Smith: Specifically I might say as to the motion to give you the details of the improvements we set up, I have a statement; I will be glad to amend it or give you a supplementary statement as to what the improvements consist of, what the cost was, but as to the other elements I would resist the motion.

75 Mr. Clay: Our motion on it is we want to move to strike paragraph 8 and paragraph 10 of the answer of the Gray Cannon Lumber Company.

The Court: I do not know what they are.

Mr. Smith: We would have to consider them separately before the ruling is made. We allege we couldn't get another place of business—out of business—what the value of the business was. That is one of the elements there.

The Court: I doubt very much whether I would let you prove you could not get any other place of business, but I would expect you to prove that by proving the value of your lease.

Mr. Smith: We have alleged the value of the lease in the first part of the answer, and allege on information and belief that there wasn't any other place we could establish

the business; for that reason, being wholly unable to get another place suitable to conduct the business, we are out of business. That refers to only one part of the business. That that business had an average monthly profit of so much, and it was worth so much money and it had been lost to us by this—

The Court: I would not let you recover for your loss of business. The rule I think I will require you to live up to is what is the value of your right of occupancy over there—I would not say the allegation might not have some bearing upon what the leasehold interest would be worth but as to counting your profits—

76 Mr. Clay: We move to strike paragraphs 6, 7, 8 and 10. Would your Honor like to have those read?

The Court: What are they about?

Mr. Clay: Paragraph 6 says—

The Court: I will say I will strike out all reference that bases your losses on loss of profits of business.

Mr. Smith: This doesn't allege profit in business. There is an allegation that the business was profitable in connection with what it was worth.

The Court: That can stand because that gives the occupation of the premises where you were a value, but what your loss is because you could not carry on business is universally held to be speculative.

Mr. Clay: Paragraph 6 (reads paragraph 6).

The Court: I will strike out all that where you allege profits in any of these paragraphs, but they may be elements to be taken into consideration as to what the value of your occupation was.

Mr. Smith: I haven't asked for the profits; I set it out, the average value of it, to show it was a valuable business and concluded the value of the business was some \$10,000.

The Court: I would not let you prove anything about your profits, the value of your business as such, but you can prove what your business was and what your leasehold interest would be worth to you.

Without reading them you can strike out all those where he alleges his profits would have been so and so.

77 Mr. Smith: You won't strike out the allegation that it was a profitable business?

The Court: No. If you were carrying on a profitable business and it was suitable for your business, whatever you can do to boost the value of your occupation over there, you do it. I want you to rely upon the value of your occupation, and when you lose that, if it is a profitable business, a good location for that, your leasehold interest is worth more than if you were in some back alley.

Mr. Smith: We haven't alleged any claim for damage for loss of profits. It is merely that we had a business; we cannot carry it on because of this order and it was worth \$10,000. We have alleged it had an average profit of \$772 as a basis for determining that profit; that is all that is contended for that.

The Court: I would let that go out.

Mr. Clay: (Reads paragraph 7 of answer.)

The Court: I would not let you recover for that. That may be stricken; that is loss to your business.

Mr. Clay: (Reads paragraph 8 of answer.)

The Court: I think all those should be stricken out. I would let you prove those things in respect to the value of your property but you are trying to recover as a substantive recovery.

Mr. Smith: I appreciate that. On the other hand isn't it subject to the objection that it is indefinite? Should we not allege it—

78 The Court: You have alleged that your business is profitable, that you had to move at a large expense.

Mr. Smith: Wouldn't you say what it was for *definiteness*?

The Court: I would not say what it was. You are not recovering for what it cost you.

Mr. Smith: The other part of his motion is to make me allege these things with definiteness.

The Court: He has changed his mind now.

Mr. Clay: I would like to present that thought to the court.

The Court: What I want to get rid of in the complaint is those elements you are talking about as a basis for recovery; what they are as a basis for determination of the value of your leasehold. You do not have to allege them in detail.

Mr. Smith: It seems proper those matters should be there as a basis, one of the elements in ascertaining what the value of the leasehold was.

The Court: It does not follow your leasehold interest was worth \$480 divided by a month. That is what I want your witnesses to testify to.

Mr. Smith: I will be called upon to prove that specifically.

The Court: I think I will let you prove it. Do not want you to allege it as if it was an ultimate amount to be recovered as measure of damages.

79 Mr. Smith: I haven't asked that as a prayer specifically at all. I don't set those matters up in the prayer that way at all; I set them up as information as part of that; they are not set up specifically in the prayer; my prayer is that this court fix just compensation.

The Court: I think the proper way to allege those things, on my theory of the case, is that you were well located, the business was well known, had been carrying it on there for a number of years, that you were unable to find any other suitable place for your business, that your business you were carrying on there was well known and profitable, and then set up on those facts that your leasehold interest there was worth so and so.

Mr. Smith: I will be glad to set it up. I would prefer to ask leave to file an amended answer on that basis.

The Court: I think that is the theory I will try these cases on.

Mr. Smith: If that is true I would move the court for leave to amend my answer.

The Court: Yes. Get them in shape so we can try what your lease is worth, all of you, and prove everything you can that would make it valuable, even if there was a place in 10 miles of Salt Lake where you could do business.

Mr. Clay: The next is the Petty Motor Company represented by Mr. Romney. We move to strike paragraphs 5 and 6 of the defendant's answer.

The Court: Are they along the same line?

Mr. Romney: They are quite different from Mr. Smith's.

80 Mr. Clay: I will read paragraph 5 (reads par. 5 of answer in Petty Motor case). The basis of our motion to strike that is that an option to renew up to the time the option is exercised and accepted is not an element of damage, being too remote and speculative.

The Court: I will deny that motion.

Mr. Clay: Exception. Now the next is a motion to strike paragraph 6 (reads par. 6). If they paid the rent in advance then I say their claim is against the landlord and not against the condemnor.

Mr. Romney: As Mr. Jones has pointed out, as the Maryland case points out, a lessee will not be required in a case of this kind to have recourse by separate action against a lessor for recovery of rent which he has paid in advance. The evidence was we paid \$440, being two months advance rent.

The Court: If the landlord got that much rent from his tenant and is keeping it in his pocket, he should not charge the Government with it. You cannot collect rent twice, or should not. The decent thing would be, if your client has the money, to pay this man his money back.

Mr. Clay: At the time I made that motion I thought these cases might be tried separately.

The Court: They may be yet.

Mr. Clay: I hope not. That is denied, that motion?

The Court: Yes, I deny that. You folks straighten that out.

81 Mr. Clay: Necessary costs and expenses incurred by answering defendant in removing from the aforesaid described premises to new premises and servicing as required by rules and regulations of the United States Government, 60 trucks at \$6 each, total \$360.

The Court: All these allegations that are based upon expenses incurred as a primary right of recovery I will strike out.

Mr. Romney: In connection with that this will be an element to prove the damage suffered—this is, the value of the lease.

The Court: Sure. You occupied these premises. Any expense that might be created for the purpose of removal, isn't your lease worth more on that account?

Mr. Romney: That is right. I felt this allegation would be proper in any event.

The Court: Put all of this in the form that to remove was expensive and costly, and to add it to the present right of occupancy that you had when the Government deprived you of it.

Mr. Clay: Is that stricken then?

The Court: As an independent allegation, as a right of recovery independent of the value of his leasehold interest, yes; if that is what it means. Set all those things up as adding to the value of your lease.

Mr. Romney: May we have an order permitting an amendment of this answer to conform to your ruling.

82 The Court: Yes, I wish you would.

Mr. Romney: I understand your ruling with respect to the \$264 item that we should plead that separately, that is, that is the value of the renewal option of this lease.

The Court: Yes. I think you are entitled, if you have an option and it was probable you would get a renewal of it—that is for the jury to say—like these tenants at will.

Mr. Romney: The second item likewise, separate pleading with respect to this \$330 advance rent paid to the landlord, should be set up separately.

The Court: Yes. Somehow you should get that out of the record.

Mr. Roberts: I am quite sure we will refund that. We will take care of that.

The Court: Take care of it some way.

Certificate.

83 I certify that the within pages numbered from 1 to 82, inclusive, contain a full, true and correct transcript of my shorthand notes of the proceedings on pretrial in the within entitled cause.

E. M. GARNETT, Official Reporter.

Dated at Salt Lake City, Utah, August 27, 1943.

Filed in United States District Court, District of Utah, Aug. 26, 1943. W. B. Wilson, Clerk. By Margaret Johnson, Deputy.

[Clerk's Certificate.]

United States of America, District of Utah, ss.

I, W. B. Wilson, Clerk of the United States District Court for the District of Utah, do hereby certify that there is attached hereto the original official report of proceedings on pretrial before the United States District Court, District of Utah, in the case of United States of America v. .7 acre of land, together with building thereon in Salt Lake City, et al., Civil No. 406.

Witness my hand and the seal of the said court at Salt Lake City, Utah, this 27th day of August, A. D. 1943.

(Seal)

W. B. WILSON, Clerk.

Filed September 2, 1943. Robert B. Cartwright, Clerk.

Reporter's Transcript of Evidence.

Appearances: O. K. Clay, Esq., Bachman, Esq., Special assistants to U. S. Attorney, appearing for the United States. Shirley B. Jones, Esq., Benjamin L. Rich, Esq., appearing for Independent Pneumatic Tool Company, a Corporation, Charles F. Wiggs, doing business as Chicago Flexible Shaft Company, The Galligher Company, a Corporation, Wm. G. Grimsdell, doing business as Grocer Printing Company. Vernon Romney, Esq., George L. Nelson, Esq., appearing for Merrill J. Brockbank, doing business as Brockbank Apparel Company, Petty Motor Company, a partnership. H. A. Smith, Esq., appearing for Gray-Cannon Lumber Company. Ben E. Roberts, Esq., appearing for Willard B. Richards and Alice Richards.

Salt Lake City, Utah, Monday, March 29, 1943.

Before Honorable Tillman D. Johnson, Judge, and a jury

2 (A jury of twelve good and lawful persons was thereupon called, examined, chosen and sworn herein.)

(Thereupon the further hearing of said cause was adjourned to Tuesday, March 30, 1943, at ten o'clock a. m.)

Tuesday, March 30, 1943, 10:00 o'clock A. M.

(Pursuant to adjournment, the further hearing of said cause was resumed, and the following proceedings were had.)

(Exhibit 1 was thereupon marked by the reporter for identification.)

The Court: What is the exhibit? It purports to be a map of the premises?

Mr. Jones: Yes your Honor.

The Court: It may be received for illustrative purposes. Call your first witness.

Mr. Jones: I would like to make a brief supplemental statement to what your Honor said yesterday.

The Court: You may do so.

3 Mr. Jones: Ladies and gentlemen, this case will be somewhat different than the other condemnation cases that some of you, probably all of you, have been listening to in this court.

In this case the government sought to take over the Terminal Building, as you have been told, on South West Temple, just south of the Dooly Building under an indefinite lease. They did not seek to condemn the property itself, but simply a lease-hold interest in it, and to exclude and evict everybody who was in their from their occupation in order that the government might have a lease

So that as to these defendants—and I will speak now only as to the defendants that I represent—that will be the Grocer Printing Company—W. G. Grimsdell, who occupied the premises shown on Exhibit 1 by red outline; the Independent Pneumatic Tool Company, shown in green—

The Court: Let's stick to individual names.

Mr. Jones: Independent Pneumatic Tool Company is a corporation represented here by Mr. Baird.

The Court: It is his corporation?

Mr. Jones: No, it is a national corporation; he is the local representative.

The Court: What is the name of it?

Mr. Jones: The Independent Pneumatic Tool Company.

The next one—then there comes a vacant store we told you about yesterday—the next person we represent is
4 Mr. Charles F. Wiggs, who does business under the name of Chicago Flexible Shaft Company. His premises are shown—they tell me I am colorblind, but looks like a combination of orange and pink to me.

The next one is the Galligher Machinery company. The official name of that corporation is The Galligher Company and it is represented here by Mr. Lionel Booth, the vice-president. That is shown in blue.

These people, we will show you, had been in possession

of the property from which they were evicted in these proceedings—Grimsdell for twenty-six years; the Independent Pneumatic Tool Company for three years, with a lease which had been renewed last August for an additional five years; Mr. Wiggs, for twenty-six years; and The Gallagher Company for eighteen years. They had occupied these premises as tenants.

And so the issue, as has already been defined by the court, in this case, for you ladies and gentlemen to determine, will be the compensation which they are entitled to recover by reason of having to relinquish occupancy of said premises—that is, to move their business and go some place else.

We will show you, as is customary in these war cases, the tenants were required to move out immediately and find such other premises as they could.

The Court: Give us the date from which we count.

Mr. Jones: November 11, 1942, the court issued an order requiring Mr. Wiggs, the Independent Pneumatic Tool Company—on November 11th the court issued an order requiring the Independent Pneumatic Tool Company to move out by November 17th, six days later—

The Court: We don't go into the detail. All we want is the date—

Mr. Jones: Which do you contend, Mr. Clay, is the date from which we mark—November 11th?

Mr. Clay: Do you mean for the purpose of fixing whatever damages—

Mr. Jones: Yes, that is right.

Mr. Clay: I think November 11th is the date, in the absence of any showing.

Mr. Jones: I think so, too.

The Court: I will say it is. We will call it November 11th. Everybody is agreed to that.

Mr. Jones: That is the date, according to the Supreme Court of the United States. So on November 11th the tenants of the building were required to move out at once and seek other quarters as best they could.

In the cases you have been trying there has been some market value for property—you have been fixing the market value of real estate. In these cases, under the situation, the defendants are entitled to just compensation, and we have different rules for fixing the compensation to which they are entitled, and the court will tell you what they are, later.

6 In order to move Mr. Grimsdell, who operated the printing shop for twenty-six years, had to move up the street on the other side, a block away, had to take out a new lease at advanced rent, move his heavy machinery, fix up the premises at the new place to accommodate and hold the machinery, and his actual moving expense, actual out-of-pocket expenses, were very heavy, and we will give you the exact figures on that.

The Independent Pneumatic Tool Company had to move over here on Fourth South Street and take other quarters there, and take such quarters as they could find, and their rent was increased and they had to take a new lease, had to pay additional rent and additional expense, and their moving costs.

Mr. Wiggs of the Chicago Flexible Shaft Company moved across the street here on Fourth South, and he had heavy moving expenses which will all be detailed to you.

The Galligher Company had to move clear over on to Motor Avenue and Second East, and take out, the same as the other gentlemen, a lease on the property they could find, and pay their costs and moving expenses, which we will show you what the actual out-of-pocket expense of these tenants has been, and also show you as best we can what their occupancy was worth to them by showing you what they have lost by reason of being compelled to relinquish the occupancy which they have held for so many years.

7 Mr. Clay: If your Honor please, I would like to supplement to some extent the statement made to the jury by Mr. Jones, but before we do that I should like to make a motion, if the court will permit me.

In three of these cases, the Grocer Printing and The Galligher Company and the Chicago Flexible Shaft Company, we have filed a written motion for a summary judgment.

which was by the court denied, and thereafter amended answers were filed—

Mr. Jones: Long before that, Mr. Clay—long before that.

Mr. Rich: By permission of the court, before the court went to California.

Mr. Clay: I may be mistaken. I just wanted to have the court pass on the amended answers.

Mr. Jones: They were here at the time we argued the motion.

Mr. Clay: May the record show the motion that was argued before the court was to the amended answer, and not to the original?

Mr. Jones: That may so show, and the same ruling.

Mr. Clay: May the record show an exception to the ruling?

Mr. Jones: Yes.

Mr. Clay: Supplementing to some extent the statement of Mr. Jones—it may or may not be material—I think it is, in view of the statement which he made—on November 8

11th we had a hearing in this court at which hearing all the defendants, the parties interested, were present in court, and after they stated to the court within what time they could conveniently vacate the premises, the Independent Pneumatic Tool Company was by the court given to November 17th to vacate. The Galligher Company was given to November 21st to vacate—

The Court: No, I didn't give it to them. It was agreed to by the government agents.

Mr. Clay: That is right.

The Court: —By consent, on their own statements.

Mr. Clay: That is right.

The Chicago Flexible Shaft Company to November 17th. Brockbank Apparel Company, November 20th—

I am reading from the order, gentlemen—

Gray-Cannon Lumber Company as to Room 102, November 17th; as to Room 100, November 20th—

Grocer Printing Company, December 1, 1942.

Petty Motor Company, November 24, 1942.

The Court: Call your first witness.

Mr. Jones: I don't know whether the other defendants wanted to make a statement or not.

Mr. Smith: I should prefer to make a statement when we open our case, if that is consistent.

The Court: I assumed that.

9 (Thereupon the defendants, to sustain the issues upon their part, gave in evidence the following:)

W. G. GRIMSDALL, was thereupon called as a witness by and on behalf of the defendants herein, and having been first duly sworn herein, testified as follows:

Direct Examination.

By Mr. Jones:

Q. You may state your name.

A. W. G. Grimsdell.

Q. And your residence?

A. 914 First Avenue.

Q. Salt Lake City?

A. Yes, sir.

Q. Mr. Grimsdell, are you in business in Salt Lake City?

A. Yes, sir.

Q. And what is the name of your business?

A. The Grocer Printing Company.

Q. How long have you been in business under that name in Salt Lake City?

Mr. Clay: Just a minute.

If you Honor please, we object to any evidence on the part of the Grocer Printing Company in this action for the reason that the amended answer filed herein does not set out any

facts or claims which are proper legal measure of damages in an action of this kind.

The Court: The objection is overruled.

Mr. Clay: Exception.

10 (Thereupon the last question was read by the reporter, as follows:)

"Q. How long have you been in business under that name in Salt Lake City?"

A. I should think about forty-four years.

Q. Calling your attention to the Terminal Building on South West Temple, were you located in that building?

A. Yes, sir.

Q. And for how many years?

A. Twenty-six years.

Q. When did you move out of there?

A. We finished moving out of there about the 3rd of December.

Q. Of what year?

A. 1942.

Q. Moved out pursuant to this proceeding and as a result of the court order?

A. Yes, sir.

Q. Mr. Grimsdell, what was the floor space in your property in square feet.

A. Five thousand feet.

The Court: That doesn't mean much. I would rather you give it in dimensions.

The Witness: It was about 33 by 150.

The Court: The jury will get a better impression what it is all about if you give the dimensions.

Q. (By Mr. Jones:) Did you move to the new location.

A. Yes, sir.

11 Q. Can you give me the dimensions of the new location?

A. The new location is about 60 by 75 feet.

Q. What is the nature of your business?

A. Commercial printing business.

Q. And has that been the business you have conducted

for the twenty-six years in the old Terminal Building, and for the past forty-four years in Salt Lake City?

A. Yes, sir.

Q. What do you mean by "commercial printing business," briefly?

A. Well, office printing and briefs, letterheads, almost anything that a business house would use.

Q. Do you have presses?

A. Yes.

Q. Use Line-o-type machines and cutting machines?

A. Yes, sir.

Q. Describe briefly your machinery and equipment that you used in your business.

A. Well, we have a cylinder press, we have a Miehle vertical, we have a Kelly press, a Kluge 2 hand-feed press, cutting machine, perforators, ruling machines, saw trimmers, type.

Q. Do you have or use Line-o-type machines?

A. Yes.

Q. On your premises?

A. Yes, sir.

Q. How many?

A. Two.

12 Q. Give us the approximate weight of this machinery.

A. I think it is sixty thousand pounds.

Q. Just give it separately.

A. You mean the different machines?

Q. Yes.

A. Our cylinder press weighs eighteen thousand pounds.

The Miehle vertical weighs 3,200.

The Kluge weighs 3,000.

The Kelly, 5,000.

Cutting machine, 7,500

Platen presses, 1,200 and 2,000.

Folding machines, 2,000

Perforator, 1,000.

Rotary perforator, 1,600.

Stitcher, 1,000

Drill, 500

Paging machine, 700.

Punching machine, 1,000.

Ruling machine, 4,000.

Embossing press, 900.

Standing press, 1,300.

Board shears, 1,200.

Backing machine, 800.

Round-corner machine, 200.

Proof press, 300.

Proof press rotary, 300.

Saw trimmer, 400.

13 Mitering machine, 300.

In our type cases and one thing and another we had 15,000 pounds, and we have a spray gun, 800 pounds, galley cabinets about 500.

The total, I think, is 60,200.

Q. Did you have any stock in paper?

A. I didn't have so much paper on hand, no; maybe a couple ton.

Q. Four thousand pounds of paper?

A. Yes, sir.

Q. Was all that machinery and equipment used and necessary in your business?

A. Yes, sir.

Q. Did you require, in your old location, and when I am discussing location I will refer to the Terminal Building location as your old location and the one up the street as your new location—

What is the address of the new location?

A. We are using 147—there are four rooms—

Q. 147 South West Temple?

A. Yes.

Q. That is across the street and north a block from where you were?

A. Yes, sir.

Q. At your old location did your machinery and equipment require any special supports or installation in order to operate and use it?

A. When we first went in we had to reinforce the floors.

Q. Did you do that?

14 A. Yes, sir.

Q. What about your electrical current?

A. We have two currents. We have alternating and direct current.

Q. Are both necessary in the use of your machinery?

A. Yes, sir.

Q. How many employees do you have and did you have at the old location and at the new?

A. Twelve.

Q. The same number at both places?

A. Yes, sir.

Q. What rental were you paying at the old location?

A. Eighty dollars a month.

Q. And for how long a period of time had your rental been that amount?

Mr. Clay: Object to it as immaterial, if your Honor please.

The Court: The objection will be overruled.

Mr. Clay: Exception.

Q. About how long had your rent been eighty dollars a month?

A. I should judge eleven years.

Q. Had you had more than one landlord?

A. Yes, we had about four landlords, I think.

Q. Were you operating under a lease?

A. No, sir.

15 Q. How long had you been there on this property without any written lease?

Mr. Clay: I don't want to keep interrupting. May it be understood all this goes in over our objections?

The Court: If you will state what your objection is, to

see whether it is applicable. You are objecting because they didn't have any term lease?

Mr. Clay: That is right.

The Court: That it is a month-to-month rent?

Mr. Clay: For which reason it is immaterial whether they were there one day or twenty-five years.

The Court: You claim they are not entitled to recover anything?

Mr. Clay: That is right.

The Court: May be understood that objection may go to all of the testimony to which it naturally would apply.

Mr. Clay: I take it it is overruled, and an exception.

The Court: Yes.

Mr. Clay: Mr. Jones suggests we make a blanket objection to any evidence which would support or might tend to support any of the allegations of the answer. If that is not too broad and the court wants to rule on it now, we will except, and won't interrupt any more.

The Court: It may be so understood, it being understood that your objection goes to the proposition that because they did not have a term lease they are not entitled to recover anything.

16 Mr. Clay: That plus the fact that under no circumstances would they be entitled to recover the expense of moving or any expense incurred in the new location.

The Court: Perhaps be just as well to let the jury understand what the ruling of the court will be in the instruction; it will be to the effect that the matter of the term lease or renting or occupying from month to month will be a matter for the jury to determine as to what the measure of damages should be under all the evidence in the case, . . . it being shown that it is the purpose of the government to hold this property as a war measure as long as the war lasts, and then surrender it back to the ownership.

Mr. Clay: That is right.

The Court. And also that while the primary question is the loss to these tenants for being deprived of the use and occupation of the old building or the portions of it, the Terminal Building, the measure of damages may or may not be determined by the cost of moving to the new location, the difference in rent and so forth. That is a question for the jury.

The real and primary question to be submitted to the jury will be the loss that these tenants have sustained by reason of being deprived of the occupation of the premises that they were occupying. But the measure of damages may be based upon the cost of moving, the increase in rent, if the jury shall conclude that is or should be the method by which the damages may be determined.

17 Mr. Jones: We discussed that question with your Honor. I think your Honor has stated our position.

The Court: But the primary question is the compensation to be made by reason of being deprived of the occupation of these premises.

Mr. Jones: In order that the record may be clear, I will say to your Honor and to the jury that all of the evidence that we will produce will be directed to determining the value of the loss of occupancy of these premises and what these defendants have lost by being deprived of that.

The Court: For instance, what I mean, that the jury may understand, and counsel as well, this witness has testified he installed all this heavy machinery. As I understand his testimony, he installed that, or his company did; the landlord did not do it.

Mr. Jones: That is right.

The Court: All of that installation cost something, I assume, and it was in place, and in use at the time they were required to vacate these premises. Presumably they had to make like installations in the new premises occupied by them. The installations that had been made previously of all those various machines in the old place of business, paid for by the company, naturally should add something to the value of the premises to them that they were required to give up.

Mr. Jones: One way of showing that is to show what they have to pay to replace it.

18 The Court: Or else to show what it cost them to put it in.

Mr. Jones: Take it both ways.

The Court: Take it both ways. Might be exaggerated in the new installation; they might have done a better job.

Mr. Jones: We will bring that out. If I don't, I guess Mr. Clay will.

The Court: You object to all that because they didn't have a lease, term lease?

Mr. Clay: That is right.

The Court: It may be so understood.

Mr. Jones: For the court's information, and counsel, I am not directing any of this evidence to loss of profits or loss of business. There is a very grave doubt in my mind that we are not entitled to do that.

The Court: I would rule you can not prove loss of business.

Mr. Jones: I am not offering to as to these defendants. I am not speaking for the others. None of my evidence will be directed to loss of business or loss of profits.

Mr. Clay: That is for the jury to decide.

Mr. Jones: I don't think it is, because there won't be any evidence as to that as far as these witnesses go.

19 (Thereupon the last question was read by the reporter, as follows:)

"Q. How long had you been there on this property without any written lease?"

A. Twenty-one years.

By Mr. Jones:

Q. Twenty-one years without any written lease at all?

A. Yes, sir.

Q. Were you satisfied with your location in the old place?

A. Yes, sir.

Q. You desired to stay there and continue there?

A. Yes, sir.

Q. How many employees did you have?

A. Twelve.

Q. You have answered that—pardon me. Is your business received largely from permanent regular customers, or from transients, or how, if you can tell us?

A. Most of my business comes from regular customers.

Q. Who know where you are, and where to find you?

A. Yes, sir.

Q. Could you give us an estimate of about what proportion of your business is regular business or regular customers who know where you are—where you were—and how to find you there?

A. Oh, I should judge eighty per cent.

Q. Are there any competitive businesses—any other printers in the same locality as you, and if so, where?

A. There is one—

Q. In the old location?

20 A. There is one across the street, nearly down to Third South on the east side of the street, of West Temple.

Q. He is still in the locality?

A. Yes, sir.

Q. You are out of it?

A. Yes, sir.

Q. Was your business a profitable business?

A. Yes, sir.

Q. What was its approximate volume—average volume over the past three or four years?

Mr. Clay: I object to that as immaterial and irrelevant and incompetent, if the court please.

The Court: The objection may be overruled.

Mr. Clay: Exception.

The Court: You need not stop to argue anything if you will stay within the rule or limits on the theory of the court.

A. About sixty thousand dollars a year.

Q. Volume of business, average?

A. Yes, sir.

Q. Now, Mr. Grimsdell, were you in one room or several rooms at the old location?

A. The old location we were in one room.

Q. Were your machines conveniently located, one to another?

A. Yes, sir, very.

Q. And were they arranged so you could carry on your business conveniently at that place?

A. Yes, sir.

21 Q. I think you have testified you did not desire to move?

A. No, I did not.

Q. And had you had any intimation of any kind prior to this proceeding, that you would be required to move?

A. No, sir.

Q. And you would have stayed there indefinitely but for these proceedings?

A. Yes, sir.

Q. Now, Mr. Grimsdell, you moved, I think, on the 3rd of December, you said; and between the time when you received the order of this court to vacate, on November 11th, or after that time, did you make an effort to secure a new location?

A. Yes, sir, we did.

Q. Did you become familiar with the conditions existing at that time as to the availability of vacant property suitable for your business?

A. Yes, sir.

Q. Were there a large number of buildings available suitable for your business?

A. No, sir.

Mr. Clay: I object to it unless the time is fixed.

Mr. Jones: I have fixed it as November 11th and after that.

Mr. Clay: You haven't so stated in your question.

Mr. Jones: We will confine it.

92 Q. I want you to understand I am talking about conditions from November 11, 1942. You understood that, didn't you?

A. Yes, sir.

Mr. Jones: Now you may answer the question.

Mr. Clay: I object to what the conditions were after that time.

The Court: November 11th up to the time he did move, he looked around to find a place. I assume that is what you mean.

Mr. Jones: That is right.

The Court: He can testify.

A. Yes, sir. It was very hard to find a place. There was hardly any place in town.

Q. On account of your electrical requirements which you have stated your machines required, alternating and direct currents, was it necessary for you to find a place where you could secure that kind of current?

A. Yes, sir.

Q. And is direct current available in all the business properties in the city?

A. No, sir, it is not.

Q. Did you finally find a place where you could locate?

A. Yes, sir.

Q. Did you find more than one?

A. No, we did not find a place large enough. The place we have now is not large enough.

Q. Did you find more than one?

23 A. No, sir.

Q. Did you take the only place you could find where you could get direct current?

A. Yes, sir.

Q. Were there any other places you could find, even if they did not have direct current, that were suitable and large enough for your business?

A. No. We looked from State Street to about First West and Ninth South to North Temple Street, and were not able to find a place.

Q. And you moved then to where?

A. 147 South West Temple.

The Court: Where is that with respect to the old place?

Mr. Jones: That is across the street and up a block.

The Witness: Yes, it is right in the middle between First and Second South on the east side of the street, and the old location was just below the Dooly Block on the west side of the street.

Q. Who is your landlord there?

A. The Union Trust.

Q. I mean at the new property.

A. The Utah Power and Light.

Q. Were you able to move in there on a month-to-month basis?

A. No, sir.

Q. What were you required to do?

24 A. We had to take a five-year lease.

Mr. Jones: Let me see that lease, Mr. Grimsdell. Unless Mr. Clay wants it—and he says he doesn't—we are not going to put these things in the record and make the record any longer than it needs to be.

I will ask about some of the contents of the lease.

Q. Could you secure this property without taking out this five-year lease?

A. No, sir.

Q. And that lease was five years from January 1, 1943?

A. Yes, sir.

Q. At your old location what was included—what service, if any, was included in the eighty dollars you paid for rent?

A. It included our heat.

Q. Anything else?

A. No, sir—and water—pardon me.

Q. What about watchman service?

A. Yes, we had watchman service.

Q. So, for eighty dollars you had rent, heat, water and watchman service?

A. Yes, sir.

Q. What is your rental under the lease at the new place?

A. \$125 a month.

Q. Does that include heat?

A. No, sir.

Q. Did you make an investigation as to the average

annual cost of heat in this property, this new property, for the past fifteen years?

A. Yes. Mr. Snawor—

25 Q. Just tell me whether you did or not.

A. Yes, sir.

Q. What would that amount to per year?

A. Six hundred dollars.

Q. Do you have to pay that in addition to your one hundred and twenty-five-dollar rent?

A. Yes, sir.

Q. Do you have to pay your own water bills?

A. No, sir.

Q. And you are not going to have any watchman service where you are?

A. No, sir.

Q. So that your additional charges for rent and heat will be the difference between eighty dollars and one hundred and twenty-five dollars per month in rent, and six hundred dollars a year in heat?

A. Yes, sir.

Q. Now, Mr. Grimsdell, have you kept track of and itemized your actual and necessary expenses in moving your machinery and equipment from your old location to your new location?

A. Yes, sir.

Q. And have you kept actual and itemized expense sheets of your actual expenses in reconditioning and putting your new premises in shape so you could occupy them with your business?

A. Well, I have got cancelled checks—

26 Q. Just say yes or no.

A. Yes, sir.

Q. Have you here with you available for Mr. Clay's inspection all the checks and vouchers to cover the expenditures you have actually made in those respects?

A. Yes, sir.

Mr. Jones: Do you want to see them?

Mr. Clay: If you will have him testify to them—

By Mr. Jones:

Q. Produce them, Mr. Grimsdell.

Mr. Jones: I will not put these in the record either, your Honor.

Q. Have you tabulated that work, Mr. Grimsdell?

A. Yes, sir.

Q. I wish you would refer to that tabulation—

Before we come to that, were the new premises at 147 South West Temple in condition for you to occupy when you leased them?

A. No, sir.

Q. Just describe briefly to the jury the condition they were in.

Mr. Clay: In addition to the general objection, we object to it as immaterial and irrelevant, if your Honor please; doesn't throw any light on anything.

Mr. Jones: Shows the necessity—

The Court: The objection may be overruled.

Mr. Clay: Exception.

27 A. One of the rooms had two partitions from the front to the back. Another one had one partition—no, two of them had one partition, one had two partitions, that had to be taken out.

By Mr. Jones:

Q. Go ahead.

A. And then the place had to be patched up, kalsomined and painted and the floors had to be supported. One press had to have a cement base put under it. And the outside had to be painted. The windows had to be fixed. There was one room the front had to be taken out and put in so we could make more room in the place.

Q. Did you make those renovations?

A. Yes, sir.

Q. Installations and repairs?

A. Yes, sir.

Q. With those made, are your premises at 147 South West Temple, the new location, the equivalent of what you had in the old location?

A. No, sir.

Q. Are they better or worse?

A. They are worse.

Q. You have five hundred feet less of floor space?

A. A thousand feet less.

Q. Is it big enough to hold all your machinery?

A. No, sir.

Q. Where do you have the overflow?

28 A. Well, we had to store a ruling machine, we had to store a sewing machine and two or three other little machines, in the Western Union Newspaper basement.

Q. There is not room in the new location for them?

A. No, sir.

Q. Is your new location conveniently proportioned for your business?

A. No, sir.

Q. Why not?

A. We have to do business in four rooms. The other place we only had one room to do business in.

Q. Were the floors sufficient to support this heavy machinery of yours?

A. No. It all had to be supported.

Q. Are the floors now in condition for you to occupy efficiently with your business?

A. No. The floors in the four rooms will have to be re-laid.

Q. Will the Power Company do that for you?

A. No, sir.

Q. Were your floors in good condition in the old building?

A. Yes, sir.

Q. You haven't done that work yet?

A. No, sir.

Q. Of re-laying the floors. Have you been able to get it done?

A. Not yet.

Q. Have you tried to?

A. Yes.

Q. And why haven't you been able to?

29 A. Well, we haven't been able to get the lighting fixtures fixed on account of priorities.

Q. Have you had bids and estimates from regular men employed in that business as to the cost of repairing the floors?

A. Yes, sir.

Q. What is that item?

A. \$725, I think.

Mr. Clay: What is that for?

Mr. Jones: That is for fixing up the floor.

Mr. Clay: That has not been done yet?

Mr. Jones: No.

Mr. Clay: In view of the development that it has not been done, we move that be stricken, if your Honor please.

The Court: The objection will be overruled.

Mr. Clay: Exception.

By Mr. Jones:

Q. That is necessary, is it?

A. Yes, sir.

Q. Now, Mr. Grimsdell, is there anything else that has to be done that has not been done in order for you to operate your business properly?

A. We have to have a urinal, a larger wash stand in one of the rooms.

Q. Are your employees men and women both?

A. Yes, sir.

30 Q. Have you had bids and estimates of the cost of those things from persons engaged in the business?

A. Yes, sir.

Q. And what do they amount to?

Mr. Clay: I object to that, if your Honor please, on the same grounds.

The Court: The objection will be overruled.

Mr. Clay: Exception.

A. Fixing the urinal and wash stand, ninety dollars.

Q. Is your electrical work complete?

A. No, sir.

Q. Have you to do any electrical work that you have not included in the itemized list about which I am presently going to examine you?

A. Yes, there is some lighting wiring that has to be done.

Q. Is that necessary?

A. ~~Yes~~, sir.

Q. Have you had bids and estimates from recognized electrical workers on that?

A. Yes, sir.

Q. What will that cost?

Mr. Clay: Let me ask you, Mr. Jones, is it in your pleading?

Mr. Jones: Yes.

Mr. Clay: I will take your word for it.

The Court: If it is not in there you can amend.

Mr. Jones: I am going to ask to amend some of these things.

Mr. Clay: May the record show an exception.

By Mr. Jones:

31 Q. What is the amount of that?

A. One hundred dollars.

Q. What will that consist of?

A. It will consist of lighting two of the rooms; two of them have been fixed.

Q. Now, then, coming to your actual moving—you say you have twelve employees?

A. Yes, sir.

Q. Did you use any of your own employees in your moving?

A. Used all of them.

Q. Did you use all of them for any appreciable length of time exclusively in your moving?

A. Yes, sir.

Q. So that their time was not used at all in your own business?

A. No, sir.

Q. And how long did you use all of the employees exclusively in moving?

A. Two weeks.

Q. Have you figured out what your pay roll was for those two weeks for those employees?

A. Eight hundred and fifty dollars.

Q. And did you pay it?

A. Yes, sir.

Q. That is, when the employees did nothing with reference to carrying on your business?

A. Yes, sir.

32 Q. Referring to your actual expense that you have paid, have you got that there?

Mr. Jones: Do you want me to itemize it?

The Court: Haven't you a statement of it?

Mr. Jones: Yes, your Honor.

The Court: Put a statement of it in evidence for reference, and give Mr. Clay a copy of it. No use sitting here and have him recite what is in a statement.

By Mr. Jones:

Q. I show you a statement consisting of two sheets, Mr. Grimsdell, a copy of which you hold in your hand, showing a break-down for electric work and gas work, lumber for repair work, miscellaneous, erecting presses, cement base under press, taking down partitions, supporting floors and renovating, sign and window painting and kalsomining, drayage, linoleum, totaling \$2,276.34. Is that correct?

A. Yes, sir.

Q. Now, in addition to the items that you have already testified to, did you make these actual expenditures?

A. Yes, sir.

Q. In moving from your old to your new location?

A. Yes, sir.

Q. Are there any others besides these and the ones that you have enumerated yet to be done in your actual expenses?

A. No, sir, I don't think there is.

33 (Exhibit 2 was thereupon marked by the reporter for identification.)

Mr. Jones: Does your Honor want one of these for yourself?

The Court: No, I do not care for it. I wanted it marked for convenience of counsel and the jury and possibly for the

court, too—not as evidence, but as a summary of his evidence.

Mr. Clay: That is right.

The Court: Identify it as an exhibit.

Mr. Jones: This paper, consisting of two sheets, has now been marked Exhibit 2, and it shows for electric work and gas work a total expenditure of \$624.66—

The Court: No use repeating it.

Mr. Jones: I don't know how we will get it in the record, your Honor, if the exhibit is not admitted.

The Court: It is admitted, as a summary of his testimony, and may be referred to as such.

Mr. Jones: And may be in the record for that purpose?

The Court: Certainly. Just as well do that and have it summarized now as to have the reporter copy it later on.

Mr. Jones: I think I gave the total.

Mr. Clay: May the record show my objection to that exhibit?

Mr. Jones: I think we better offer it first.

We now offer Exhibit 2 as a summary of his actual expenditures in moving.

Mr. Clay: We object to it.

34 The Court: It may be received as a convenience to the court and jury and counsel.

Mr. Clay: May the record show an objection to it, if your Honor please, and an exception.

The Court: Just the general objection that has been made?

Mr. Clay: Yes.

The Court: Do you object to having it in the record so you can refer to it?

Mr. Clay: Yes, I will object to that, too; because we think it is not material.

The Court: That is a different proposition. But don't you want it so it will be convenient for you?

Mr. Clay: Yes, I should like to have a copy of it for my convenience.

The Court: It is not primary evidence, of course. I think you ought to add to it and have on the same sheet the estimate he made as to the work that has not been done.

Mr. Jones: Very well.

The Court: Suppose you supplement it by putting that on.

Mr. Jones: I will offer it, and withdraw it, and supplement it. It may require another sheet.

The Court: That will be all right. Let's get it on a piece of paper so when we get through we can have something we can refer to, evidencing Mr. Grimmsdell's claim.

35 Mr. Jones: I am afraid if the jury had to carry these figures in their heads they would be a little bewildered at the end of it.

Q. Those items total \$2,276.34?

A. Yes, sir.

Q. And that is money that you have actually paid out for the things I have enumerated in your moving operations?

A. Yes, sir.

Q. And were they, all of them, required by reason of your moving from your old to your new location?

A. Yes, sir.

Q. Were any of them unnecessary?

A. No, sir.

Q. And with the expenditure of these amounts and the additional amounts that have yet to be expended in the future, your premises at the new location will not be the equivalent of what you had?

A. No, sir.

Q. The item of additional heat and rent for the five-year term of ninety-five dollars a month totals fifty-seven hundred dollars—that is right, isn't it?

A. Yes, sir.

Mr. Clay: How long did you say, Mr. Jones?

Mr. Jones: Five years.

Mr. Clay: How much did you say?

36 Mr. Jones: Fifty-seven hundred dollars. Ninety-five dollars a month for five years.

Q. As I total that, Mr. Grimsdell, your actual out-of-pocket expense is \$9,731.34 by reason of this move from the old to the new location?

A. Yes, sir.

Q. In securing this work, having this work done, hiring the artisans and laborers, did you get the best prices you could?

A. Well, it was hard to get a price. We had a hard time even to get a man to move us. The Salt Lake Transfer Company moved us, but it was a hard job to get them to do it.

Q. Well, did you finally do it?

A. Yes, sir.

Q. And did you pay the regular prices for moving?

A. Yes, sir.

Q. And these artisans and firms who did your work, did you pay the regular prices charged you by them?

A. Yes, sir.

Q. And were they skilled, and employed in that work as a business?

A. Yes, sir.

Q. So that for all this work you got the best, most favorable price you could?

A. Yes, sir.

Q. On the 11th of November, Mr. Grimsdell, would you have been willing to move from your present to your new location had you not been compelled to, but willing to move if things were right, had some one come to you and
37 offered to pay your cost of moving and increased rent?

Mr. Clay: I think that is speculative, if your Honor please—way beyond the possibility of any accurate measurement. I object to it as immaterial.

The Court: He has already answered that he did not want to move. He was satisfied where he was, to stay there indefinitely.

Mr. Jones: I am asking him, even if he had all his expenses paid, would he have been willing to move.

A. No, sir.

Mr. Clay: The court had not ruled. I ask the answer to go out until the court rules.

The Court: I think it may stand. He has said that already, in effect.

By Mr. Jones:

Q. This equipment you have not been able to put in your new property and have stored at the Western Newspaper Union, how much space is that?

A. I should judge it took about thirty feet by fifteen, something like that.

Q. What rent are you paying for that, if anything?

A. Made no arrangement on it at all.

Q. At your old location, what kind of building was it?

A. It was a two-story building with a basement.

Q. What were the working conditions—in summer, for instance?

A. They were very good.

38 Q. What is your new building?

A. I haven't been in there in the summer time.

Q. Is it one story or two-story?

A. It is a one-story building, flat roof.

Q. Flat roof, one-story building?

A. Yes, sir.

Q. Any basement?

A. No, sir.

Mr. Jones: That is all. You may cross-examine. I don't know whether I made these checks available to you so the record shows it.

Mr. Clay: You did. And I don't want to go through them, thank you.

Cross Examination.

By Mr. Clay:

Q. Mr. Grimsdell, referring now to Exhibit 2—you have a copy in your hand, haven't you—under the heading of "Electric Work & Gas Work," the total of which is \$624.66, that was all on the new building?

A. Yes, sir—well, there is some gas work down in the miscellaneous, too, M. G. Erickson.

Q. I will get down to that. And next you have "Lumber for repair Work." That was all in the new building?

A. Yes, sir.

Q. And under your "Miscellaneous," such as the Lovinger Disinfectant Company, Anthony Tobish for cleaning presses—that was all in the new building?

A. Yes, sir.

39 The Court: When you say "new building," you mean new location?

Mr. Clay: Yes—new location.

By Mr. Clay:

Q. For instance, that item of fourteen dollars for cleaning presses, was that caused solely by moving?

A. That was a cylinder press; that all had to be taken down and cleaned up before we could put it back up together again.

Q. You clean them occasionally whether you move or not, don't you.

A. No. A cylinder press has to be all dismantled, all taken apart, because it weighs too much to take it up in one piece. Then the grit and one thing and another has to be washed off and cleaned up. Put it in a tub to do that work.

Q. That was caused solely by your moving?

A. Yes, sir.

Q. And what is the Utah Sand & Gravel Company twenty-seven dollar item for?

A. That was for cement to put in for the cement base under our big cylinder press.

Q. What was the Fritz Wallmeuller item?

A. He is a mechanic who does most of the work for all the print shops.

Q. What did he do?

A. He dismantled the machines and erected them again in the new place.

Q. What is the item, "T. B. Montgomery"?

40 A. He is a carpenter-contractor.

Q. All these items to Montgomery shown on the second page of Exhibit 2 was for work done at your new location?

A. Yes, sir.

Q. The same work with Mr. Modine?

A. Mr. Modine was a man that Mr. Jones of the Western Newspaper Union loaned me for two weeks.

Q. You paid him sixty-nine dollars?

A. I paid him sixty-nine dollars, and forty-seven dollars and fifty cents.

Q. That was all for work which he did at the new location?

A. Yes, sir.

Q. And the same way for Mr. Boettner—two of them—all work at your new location?

A. Yes, sir.

Q. This was in addition to your own employees?

A. Yes, sir.

Q. Bird & Jex, for painting sign on window?

A. That was for renovating the sign we had on the old place and putting it up on the new place, and painting windows—putting the sign on the window.

Q. What do you mean by renovating the old sign?

A. The old one, when we took it down on the old place, was kind of worn out, been up for a long time. And it was a gold-leaf sign. Can't get any gold-leaf any more. So we had to have it painted green and white.

Q. That was a sign extending out over the sidewalk?

A. No, it went right straight across the face of the building.

Q. You said it had been there a long time, probably needed renovating, didn't it?

A. If we had left it up, all we would have to do was to paint it.

Q. By taking it down, what did you have to do?

A. They took it over to their place and painted it over there and brought it back and put it up.

Q. All they did there was to paint it, wasn't it?

A. Yes, sir.

Q. The drayage cost appears on page 2 of the exhibit?

A. Yes, sir.

Q. Those were men not employed, not your regular employees?

A. No, it was the Salt Lake Transfer Company men.

Q. You paid the Salt Lake Transfer Company \$354.91 plus the amount that you paid the other men as shown on this exhibit?

A. That was just for drayage and taking the machinery and the supplies from one place to the other.

Q. That is the men you paid, these men?

A. It was the Salt Lake Transfer Company for the drays, and they furnished their own men.

Q. How about Wirthlin and Jensen? Were they Salt Lake Transfer Company men?

A. No.

Q. What did they do?

A. We had a little jag of stuff, we wanted to move it, so they were draymen, stood over on the corner—we
42 picked them up to take it over.

Q. Those were the men that moved your property over to the new location?

A. Just the small stuff.

Q. Linoleum, you have here, forty dollars. That was at the new location?

A. Yes, sir, that was taking it up at the old location, putting it down in the new location.

Q. Mr. Dangerfield did that?

A. Yes, sir.

Q. This lease that you have at the new location provides for a ninety-day cancellation clause, is that right?

A. Yes, sir.

Q. Then there is a clause here, a cancellation provision provided by paragraph 3, shall only be exercised in the event lessor shall desire the use of the premises in connection with its own operations?

A. Yes, sir.

Q. The lease is dated January 2, 1943?

A. Yes, sir.

Q. And runs for a period commencing January 1, 1943, and ending December 31, 1947?

A. Yes, sir.

Q. I believe you said you had a lease at the old location at one time, did you?

A. When we first moved in, five years.

Q. And it expired and you never renewed it?

43 A. No, sir.

Q. I believe you said you had paid eighty dollars a month at the old location for the past eleven years?

A. Yes, sir.

Q. What did you pay before that time?

A. One hundred and sixty dollars.

Q. And they cut it from one hundred and sixty dollars to eighty dollars a month?

A. Yes, sir.

Q. What was that principally due to, Mr. Grimsdell?

A. Well, in those days it was hard even to pay eighty dollars.

Q. In those days? You mean eleven years ago?

A. That was when all the rates were coming down.

Q. Well, then it continued at eighty dollars after that time?

A. Yes, sir.

Q. You thought that was a very satisfactory rental, did you?

A. Yes, sir.

Q. And yet you didn't have a lease on those premises, did you?

A. No, sir.

Q. The premises at the time you vacated were owned by Mr. and Mrs. Richards?

A. Yes, sir.

Q. They bought the property from the Metropolitan Life Insurance Company in October, 1942?

A. I don't know the date they bought it.

Q. Well, shortly before you vacated?

A. Yes, sir.

44 Q. And the Metropolitan Life Insurance Company owned the building for approximately four or five years, didn't they?

A. I think that is about right. I think that is when they took over from Tracy and down to the Union Trust.

Q. During all that time wasn't the Metropolitan Life Insurance Company attempting to sell this building?

Mr. Jones: If you know.

Mr. Clay: He has testified to several things he doesn't know of his own knowledge.

A. I don't know.

Q. Don't you know the building was many times shown to prospective buyers?

A. No, sir.

Q. At any rate, not having a lease you did know, didn't

you, Mr. Grimsdell, that you were subject to removal at any time by the landlord?

A. Yes, sir.

Q. You had a very valuable investment there, didn't you?

A. Yes, sir.

Q. Had a gross income of sixty thousand dollars a year? I believe you said, from the business?

A. Yes, sir.

Q. Yet you didn't think enough of that to enter into a lease?

A. No, sir.

Q. Any particular reason why, Mr. Grimsdell?

A. No.

Q. Would it be because you wanted to have the
45 advantage of the location and yet not be bound, yourself?

A. No, sir.

Q. You say you are not getting heat at your present location—have to pay extra for the heat?

A. Yes, sir.

Q. How about the water? Does your rental include the water at the new location?

A. Yes, sir.

Q. You paid your own water bill at the old location?

A. No, sir.

Q. Your hot water was furnished—didn't you pay for your culinary water?

A. We had no hot water in the old place.

Q. Did you pay any water bill at all?

A. No, sir.

Q. So that your rental there of eighty dollars included your water?

A. It did, yes, sir.

Q. The reinforcement which you did to the flooring in the old building, was that done at your expense?

A. Yes, sir.

Q. That was done approximately twenty-six years ago?

A. Yes, sir.

Q. And there had been no additional reinforcing of the flooring during the past eleven years?

A. No, sir.

Q. You say eighty per cent of your business comes
46 from regular customers?

A. Yes, sir.

Q. And twenty per cent of it is just drop-in business?

A. Yes, sir.

Q. Of course it is true, isn't it, Mr. Grimsdell, that your old customers will follow you wherever you go?

A. If you treat them right.

Q. I assume you treat them right. And you are just a block away from your old location?

A. Yes, sir.

Q. What is the principal part of your printing business? I know you do a lot of brief work, but is there some particular branch of the printing business which constitutes the bulk of your business?

A. No, sir.

Q. Furnish some letterheads, stationery, do some brief work, and what other character of printing? Print dodgers, things of that kind?

A. We print almost anything that is printed.

Q. There is no one particular class of printing that you specialize in, or that constitutes the bulk of your business?

A. No, sir.

Q. You have enumerated your items of expense up there, present and prospective. Is the landlord up there, the Utah Power & Light Company, going to reimburse you for any of that expense, Mr. Grimsdell?

A. I had to take the place as is.

47 Q. - I think that doesn't answer my question. Do you have an understanding with them about that?

A. No, sir.

Q. So they are not going to stand any part of the expense to which you have been put by reason of your tenancy?

A. No, sir.

Q. And they are making no off-set in your rent?

A. What is that?

Q. Making no off-set in your rent?

A. No, sir.

Q. I believe you stated you were occupying part of the basement, or did I misunderstand you? Are you occupying any part of the basement where you now are?

A. Haven't got a basement.

Q. There is no basement there?

A. No, sir.

Q. In the old location you occupied part of the basement?

The Witness: I didn't hear you.

Q. (repeated) In the old location you occupied a part of the basement?

A. There was a basement in the front part of the place, yes.

The Court: He asked you if you occupied it.

A. Yes, sir.

Q. Mr. Grimsdell, you said the present location is not equal to your old location. Do you mean from the standpoint of business, or merely for your convenience?

A. Well, the place isn't a good place to do the
48 business.

Q. Have you been there long enough to determine whether or not your average business in that location will be about the same as in the old location?

A. Well, we have only been there two months.

Q. And you think that is not quite long enough to determine?

A. No, sir.

Q. As far as you know, you will do as much business in the new location as the old?

A. Well, that will have to wait to be seen.

Q. You haven't lost any of your old customers, so far as you know?

A. No.

Q. And as you say, if you give your old customers service, the likelihood is they will follow you a block away? Do you think that is correct?

A. What is that?

Q. Assuming you continue to give them good service, the fact you are a block from where you used to be will have no effect on them?

A. Well, it might not.

Q. I think you testified on direct examination that there were four stores in your present location?

A. Yes, sir.

Q. With some partitions between?

A. Yes, sir.

Q. That you knocked out all or part of the partitions?

A. That was the partitions going across, making,
49 as you might say, eight rooms out of the place instead of four. We took those out.

Q. So you would have access to all your machinery?

A. Had to cut holes in the partitions so we could get from one place to the other.

Mr. Clay: I think that is all.

Redirect Examination.

By Mr. Jones:

Q. Mr. Grimsdell, this new lease, does it or does it not give you the right to terminate it on ninety days notice?

A. No, sir.

Q. Just the Power Company?

A. Yes, sir.

Q. I think you testified at your old place you had been there under four landlords.

A. I said, I think, four landlords.

Q. You had been there without any written lease under all of them?

A. No; Tuttle & Tuttle was the people we rented from in the first place, under the first lease.

Q. Every one since then has been without any written lease?

A. Yes, sir.

Q. And at the time of these proceedings you were still there, and I think you said there was no intimation you could not stay as long as you wanted?

A. Yes, sir.

Q. You were there with these other tenants who are defendants here, who were your customers?

A. Yes, sir.

Q. Substantial customers?

A. Yes, sir.

Q. And you were all there right together?

A. Yes, sir.

Mr. Jones: I think that is all.

Recross Examination.

By Mr. Clay:

Q. Of course you knew, Mr. Grimsdell, that with a war on and the activity that was going on in Salt Lake, and other cities, that space was growing scarcer all the time in Salt Lake, didn't you?

A. Yes, sir.

Mr. Clay: That is all.

Mr. Jones: That is all.

(Exhibit No. 2, offered and received as a summary of the evidence of Mr. Grimsdell is in words and figures as follows:)

"Ex. 2. "Grimsdell—Grocer Printing Co.		
"Electric Work & Gas Work.		
"55853	Schraga Electric Co.	22.50
"55843	Mine & Smelter Supply Co.	3.79
"55599	Robins Electric Co.	200.00
"56083	" " "	321.79
"55821	Artistic Lighting Co.	5.15
"55970	" " "	57.15
"55987	Mountain States Fuel Co.	14.28
		624.66
"Lumber for Repair Work.		
"55699	Hyland Lumber Co.	13.17
"55713	Utah Lumber Co.	3.25
"55718	Utah Builders Supply Co.	5.59
"55835	Hyland Lumber Co.	10.66
"55684	Anderson Lumber Co.	53.23
"55997	Utah Lumber Co.	5.25
"55661	Jacobs Cabinet Shop	18.31
	Hyland Lumber Co.	5.74
		115.20
"Miscellaneous.		
"55551	Lovinger Disinfectant Co.	1.02
"55842	" " "	5.35
"55851	Salt Lake Safe & Lock Co.	5.00
"55932	Western Newspaper Union	5.81
"55714	Utah Sand & Gravel Co.	27.73
"55831	M. G. Erickson Plumbing Co.	102.73
	" " " " "	4.99
"55626	Anthony Tobish—Cleaning Presses	14.00
"55884	American Linen Supply Co.—Rags	5.59
"55854	Smith & Adams—Awning	5.50
"55866	H. J. Mahlquist—Vent Pipe	8.55
		186.27
"Erecting Presses.		
"55865	Fritz Wallmueller	276.59
		276.59
		1,202.72

**"Cement Base Under Presses, Taking Down Partitions,
Supporting Floors & Renovating.**

"Check No.

"55505	T. B. Montgomery	21.90	
"55529	" "	17.25	
"55660	" "	40.00	
"55773	" "	10.00	
"55795	" "	3.50	
"55973	" "	19.00	
"56038	" "	9.00	
"56085	" "	5.00	
"55598	E. F. Modine	69.00	
"55625	" "	47.50	
"55611	Sigfried K. Boettner	15.00	
"55628	Kurt Boettner	4.50	261.65

Sign & Window.

"55974	Bird & Jex	102.00	
"	" "	8.50	
"55823	Bennet Glass & Paint	17.56	128.06

Painting & Calcomining.

"55531	Anderson & Crezee	100.00	
"55629	" "	50.00	
"55889	" "	60.00	
"55917	" "	15.00	
"55964	" "	35.00	260.00

"Drayage.

"55508	L. R. Wirthlin	4.00	
"55530	M. Jensen	4.00	
"55582	" "	4.00	
"55602	Perry Townsend	2.50	
"55605	R. W. Watson	2.50	
"55609	J. D. Smith	2.00	
"55610	J. A. Astell	2.25	
"55638	Bob Watson	1.50	
"55655	" "	6.25	
"55707	Salt Lake Transfer	354.91	383.91

		"Linoleum.	
"55583	Sid Dangerfield	40.00	40.00
			1,073.62
Page 1			1,202.72
			2,276.34
		over	
"Forward			"2,276.34
"New floor estimate			725.00
"Urinal and wash stand to be installed			90.00
"Electrical work yet to be done in two rooms			100.00
"Employees used exclusively in moving, payroll			850.00
"Increased cost of heat \$600 per year for 5 years			3,000.00
"Increased rent from \$80.00 per month to \$125.00 per month, \$45.00 month for 5 years.			2,700.00
		Total	"9,741.34"
54	The Court: Call your next.		

SAM BAIRD was thereupon called as a witness by and on behalf of the defendant Independent Pneumatic Tool Company, and having been first duly sworn herein, testified as follows:

Direct Examination.

By Mr. Jones:

Q. Just state your name.

A. Sam Baird.

The Court: Spell it.

The Witness: B-a-i-r-d.

Q. Where do you reside?

A. 128 North Main Street, Salt Lake City.

Q. How long have you lived here?

A. About eighteen months.

Q. Are you employed here?

A. Yes, sir.

Q. By whom?

A. By the Independent Pneumatic Tool Company.

Q. How long have you been employed by that company?

A. About ten years.

Q. And where?

A. I worked out of our Los Angeles office for about five and a half years, spent about three years for my company traveling through the far East, and I came back and took over this office a year ago last September.

Q. And how long have you been familiar with the
55 operations in this office?

A. Since September 1, 1941.

Q. Now, Mr. Baird, where was your company located—First of all, let me get you located in the old building—on November 11, 1942, where was your company located in Salt Lake City?

A. At 216 South West Temple Street.

Q. In the old Terminal Building?

A. Yes, sir.

Q. Just south of the Grocer Printing Company?

A. Yes, sir.

Q. And where was it located prior to coming to that location?

A. For I believe two years we were located in the north room of where the Grocer Printing now is. My understanding, we went in there in 1937 and was there until 1939.

Q. Was your company moved out of where Grimsdell has now moved in?

A. Yes, sir.

Q. And you were in part of that property where he is now?

A. That is right. We had one room there of the four, I believe that he mentioned. We had one room there.

Q. Was your location in the old Terminal Building better adapted to your business than the former location, where Grimsdell now is?

A. I don't know that I understand the question.

Q. Was your location in the Terminal Building better suited to your business than your location before you moved there?

A. Yes, sir.

56 Q. That is why you moved?

A. That is right.

Q. Just tell the court and jury briefly the character and nature of your business.

A. My company manufactures mining machinery, rock drills, and machinery for operating mines, and for general

contractors. We also manufacture a complete line of electric and pneumatic or air operated tools used by industries such as railroads and shipyards, airplane factories and large industrial concerns.

Q. Did you do any over-the-counter business, or did you at your location on West Temple, the old location?

A. We did some, yes, sir.

Q. And what was the general proportion of your business between over-the-counter business at the location, and business through the mail, wholesale or retail? Describe that generally.

A. Well, the bulk of our business is done through jobbers or dealers or what is termed distributors. We do some direct business, especially with the mines, but the bulk of our business nationally is done with dealers and jobbers.

Q. And what is this territory—I mean this office here?

A. We cover six states out of this office as a factory branch.

Q. In all those lines you have enumerated?

A. Yes, sir.

Q. Does your company make any particular line or manufacture any particular line of equipment that is manufactured by a limited number of other companies?

A. I might say all of our lines are.

Q. Give me an illustration of that, so we will get it in the record.

57 A. We manufacture three major lines, and in one of these, the pneumatic tools, there are four companies, that is, major companies, who are considered a factor in the business world, manufacturing a line of pneumatic industrial tools in the United States.

Q. Only four of you?

A. Yes, sir.

Q. Is your company one of them?

A. Yes, sir.

Q. There are three others than your company?

A. That is right.

Q. Go ahead.

A. And the line of rock drilling equipment used around the mines and general contractors, there are six general manufacturers, of which we are one.

Q. You and five others?

A. That is right.

Q. Do your competitors, the three in one line and the five in the other, maintain offices in Salt Lake City?

A. Of the one line—well, all three of them maintain offices; two of them maintain large factory branches serving the Intermountain territory about the same as we do.

Q. About the same as you do?

A. Yes, sir.

58 Q. What about the five in the other line?

A. All five of those maintain factory branch offices here.

Q. The same as you do?

A. Yes, sir.

Q. Has this locality in the Terminal Building—of which the Terminal Building is a part—any peculiar adaptability to your business?

A. Well, it had many in our particular business.

Q. What are they?

A. One was, a very important part to us, as I said, we operate through jobbers and dealers, and two of our dealers in Salt Lake City was the Galligher Company the Graybar Company, who were very close neighbors at the location in the Terminal Building, and it was quite easy to work in connection with those distributors.

Q. Is there a district in the city known in the trade as the mining machinery district?

A. Yes, sir.

Q. Where is it?

A. The Dooly Building.

Q. Where were you with reference to the Dooly Building?

A. We joined the Dooly Building.

Q. Beg pardon?

A. The Terminal Building joined the Dooly Building, which stands on the corner of Second South and West Temple

Q. Is it any advantage in your business to be located in that area?

59 A. I think it is a decided advantage.

Q. Are you in that area now?

A. No, sir.

Q. Are your other competitors, the three and the five?

A. Yes, sir.

Q. Just explain to the jury why that is an advantage.

A. Well, for a good many years, especially in the mining trade and the general contractors, the dealers in that class of merchandise are around that corner. Three of my competitors are in the Dooly Building facing Second South; another competitor is just north of Second South on West Temple, the industrial concerns similar to the Mine and Smelter Supply Company, and the Water Works Equipment Company, the Gallagher Company, the Graybar Company, are all in that block.

Q. You mean were.

A. Were.

Q. As I understand, then, when these persons or firms or businesses who are your customers come to trade they come to that area to do their business?

A. That is right.

Q. That is, the mining machinery district?

A. That is right.

Another thing connected with the mining industry, all of our custom assay offices are within I would say half or three-quarters of a block of Second South and West Temple, which is quite an advantage to our mining people coming
60 from the various Intermountain states into Salt Lake City in connection with their business.

Q. Now, how long had your company been in the premises in the Terminal Building?

A. Since December of 1939.

Q. Were you there under a written lease?

A. Yes, sir.

Q. I think your first lease was from October 24, 1939, three years. Is that right?

A. That is right.

Q. That commenced December 1, 1939, and ran to November 30, 1942?

A. Yes, sir, that was the original lease.

Q. And at a rental of forty-five dollars a month?

A. Yes, sir.

Q. That lease was renewed July 6, 1942, is that right—or was it in August?

A. August, I believe. I don't know the exact date—it was in August of 1942.

Q. That was renewed for an additional term of five years?

A. Yes, sir.

Q. Commencing at the expiration of the old, and the first three years of that new lease the rental was \$540, and the last two years \$600?

A. Yes, sir.

Q. So that the renewal, your first three years was at the old rate of forty-five dollars, then you went up five dollars a month, the new rate was fifty dollars?

A. For the last two years of the lease, yes, sir.

Q. What did the rental include?

A. It included the room at 216, next to the Grocer Printing, 216 South West Temple—

The Court: Give the dimensions.

A. —the heat and water.

Q. And watchman?

A. Yes, sir.

Q. Have you the dimensions of that?

A. 18 by 148 feet.

The Court: That is inside dimensions?

The Witness: Yes, sir.

Q. The square feet?

A. The square footage was about 2,664 feet.

Q. What are the dimensions of your new premises and their location?

A. Our new location is at 54 East Fourth South. The dimensions are 15 by 75 feet, or about 1,162 square feet.

Q. So in your new location you have got only about forty per cent of the space you had in the old?

A. That's right, yes, sir.

Q. Now, how many employees have you?

A. Eight, including myself, out of this office.

Q. Did you have that same number at the old location?

A. Yes, sir.

Q. Were your premises at the old location in the Terminal Building suitable for your purposes?

A. Yes, sir.

Q. Were they equipped for that purpose?

A. Yes, sir.

Q. And what did they consist of?

A. Well, we used the front end of the room for general offices, and the back part of the room we used for a stock room.

Q. Do you require in your business any special equipment for stock storage purposes?

A. We require a good many storage bins and we do a general service. From our factory standpoint ours is more of a business of service. As I stated, the bulk of our sales go through dealers. Our factory men are engineers for service. We require work benches and places where we can give service to our products.

Q. Was your property in the old Terminal Building specially equipped and fitted up to render that service?

A. Yes, sir.

Q. Is that service specialized?

A. Very much so.

Q. Can you store your parts and equipment just any old place?

A. No; they have to be taken care of.

Q. Go ahead and tell us.

A. Many of the parts in the service that we give, heat treated, honed and ground, very high precision work, some of it is quite expensive. We have parts the size of a pocket watch worth twenty-five and thirty dollars. Those
63 kind of parts and service in our business have to be taken care of. They can't be thrown around like a sack of coal.

Q. Were your premises there specially equipped by you to take care of the handling of those parts and equipment to render that service?

A. Yes, sir.

Q. Were they suitable, adapted to your needs?

A. Yes, sir.

Q. Was your business profitable?

A. Yes, sir.

Q. And approximately what is the volume of your business, the average?

A. Since I have taken over the branch—or for 1942 we did a business of about \$140,000; prior to that time I don't know; I wasn't here.

Q. 1942 your volume was about \$140,000?

A. Yes, sir.

Q. That includes your repair work and your over-the-counter business and your dealers and so forth?

A. Yes, sir; that was gross business from this office.

Q. Were you on the ground floor?

A. Yes, sir.

Q. Of the two-story building?

A. Yes, sir.

Q. How were your premises for comfort?

A. We were fixed comfortably; we had our office space partitioned off; our stock room was partitioned off from our office. We were quite comfortable—livable.

64 Q. Do you require any particular kind of light?

A. Not in particular, no, sir.

Q. Require good lighting?

A. Yes, sir, especially for our repair work, our work benches we had special lights installed.

Q. Now, Mr. Baird, when you were required to move, November 11, 1942, did you make any investigation and survey of the conditions in Salt Lake City of property suitable for your needs?

A. Yes, sir.

Q. What did you do?

A. I took the only one I could find available that would answer our purposes.

Q. What investigation—

Mr. Clay: I submit he has answered it.

The Court: The objection may be overruled. I suppose it is background.

Mr. Jones: Yes, your Honor.

Q. Go ahead.

A. I covered every street from South Temple to Fifth South and from First East to First West, all of the streets and alleys, looking for a location.

Q. And did you finally locate at 54 East Fourth South—is that it?

A. Yes, sir.

Q. Which side of the street is that on?

A. That is on the south side, facing north.

Q. What kind of building is it?

A. It is a one-story building.

Q. What kind of roof?

A. I don't know.

Q. Was it equipped for your business?

A. No, sir.

Q. Was it suitable for your business in the condition you found it?

A. No, sir.

Q. Did you find it necessary to do anything there to make it suitable for your business?

A. Yes, sir.

Q. And did you do that?

A. Yes, sir.

Q. Did you make expenditures for that purpose?

A. Yes, sir.

Q. Was it necessary to remove from your old location to your new any of your machinery and equipment?

A. We had to move all of our machinery, and we moved our bins—we had kept our stocks in racks and bins, shelves.

Q. In that moving work did you just go out and hire draymen?

A. No, sir.

Q. Why not?

A. Because ordinary draymen could not handle our stuff. We wouldn't trust it with them. We moved it ourselves.

Q. Your own staff moved you?

66 A. Yes, sir.

Q. Did you have regular draymen move anything?

A. No, sir.

Q. Are your present quarters adequate for your needs?

A. No, sir.

Q. I think you stated they are only about forty per cent—

A. Approximately forty per cent of the floor space and we are awfully crowded.

Q. With the renovating and installations that you made in the new location are they the equivalent of what you had?

A. They are the equivalent as near as we could fix up the place, with the limited floor space we have, yes, sir.

Q. We don't know what they are. Are they the equivalent of what you had?

A. Yes.

Q. You carry on your business now as you did before?

A. Yes, sir.

Q. Are they better than your other premises?

A. No, sir.

Q. Are they worse?

A. No, I wouldn't say they were; I think they are about the same.

Q. Just about the same?

A. Yes, sir.

Q. Now, in your new premises were you required to take out a lease?

A. Yes, sir.

67 Q. And how long was that?

A. Five years.

Q. From December 1, 1942, to November 30, 1947?

A. Yes, sir.

Q. And what was the rental reserved by the new lease?

Mr. Clay: We object to it as incompetent, irrelevant and immaterial, if your Honor please, so far as the issues in this case are concerned—not the measure of damages.

The Court: The objection may be overruled.

Mr. Clay: Exception.

And may all the testimony go in over our objections and an exception.

Mr. Jones: I thought we had that understanding.

A. The first year at fifty dollars a month, the other four years at sixty dollars a month.

Q. So that for the first year your rental is five dollars a month more than the old place?

A. Yes, sir.

Q. And the next year it is fifteen dollars a month more than the old place?

A. Yes, sir.

Q. And the next three years it is ten dollars a month more than the old place?

A. Yes, sir.

Q. And that is an additional rental for the five-year period of \$660 total?

68 A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now, in your new lease does the landlord furnish the heat?

A. Yes, sir.

Q. What about the water?

A. There has been nothing said to us; we have never had a water bill. I am assuming he does that, too.

Q. So for the additional six hundred and sixty dollars you get the same in rent, heat and water that you did at the old place?

A. With the exception of watchman service.

Q. Are you going to hire a watchman?

A. I don't know, yet. We are working with our insurance company now. I don't know.

Q. But that has not been included in that item?

A. No, sir.

(Exhibit 3 was thereupon marked by the reporter, for identification.)

Q. I show you what has been marked Exhibit 3 for the purpose of compilation, the same purpose as Exhibit 2 was marked and offered, and ask you if that is a statement of the expenditures that were made by you in remodeling your new location and in furnishing the materials, painting, fixing the floors, arranging the stock, installing lights, signs, truck for moving and the labor for moving, lock for the front door, and the photographs—is that right?

69

A. Yes, sir.

Q. Were those items actually paid by you?

A. Yes, sir.

Q. Were they all necessary by reason of this moving?

A. Yes, sir.

Q. Any of them give you any more than they had before?

A. No, sir.

Q. Then you have, in recapitulation, the \$660 difference in rent, \$889.31 for remodeling and moving, and \$35 estimated for plumbing. What is that?

A. We haven't been able as yet to get a plumber at our new location to fix a watercloset, and we have put in an estimate of thirty-five dollars to get that. I have called plumbers and called them, and as yet haven't been able to get one.

Q. That makes a total of \$1584.31?

A. Yes, sir.

Q. Have you made any other expenditures of any other costs actually made or necessary to be made in connection with your moving than these on Exhibit 3?

A. No, sir.

Q. Those constitute your actual out-of-pocket expenses?

A. Yes, sir.

Mr. Jones: We offer Exhibit 3, your Honor.

The Court: For the purpose indicated for 2, it may be received.

Q. I forgot to ask specifically about these thirty-six shifts for labor, \$250. That was your own staff?

70 A. Yes, sir.

Q. Was that time devoted by those members of your own staff exclusively to this work of moving?

A. Yes, sir.

Q. And the money that you have estimated was just their regular salaries?

A. Yes, sir, that is right.

Q. For that time?

A. Yes, sir.

Q. You said your new location was the equivalent—I understood you mean you are carrying on your business there?

A. Yes, sir, that is right.

Q. Are you crowded?

A. Yes, sir.

Q. Were you crowded before?

A. No, sir.

Mr. Clay: I object to it as cross-examination. He has answered that it was equivalent—no better and no worse.

Mr. Jones: It is manifest he has got less than half the space, that it is not equivalent.

The Court: I think he has pretty well covered it.

Mr. Jones: You may cross-examine.

(Exhibit No. 3, offered and received as a summary of the evidence of Mr. Baird, is in words and figures as follows:)

"Exhibit 3.

"Independent Pneumatic Tool Co.

	Old Location 216 So. West Temple	New Location 54 East 4th South
"Floor Space (Approx)	2,664 square feet	1,162 square feet
"Lease (5 Year)		
First 2 yrs.	\$45.00 per month (1st yr	\$50.00 per month
Next 3 "	50.00 " " (4 yrs.	60.00 " "
"Costs For Remodeling:		
"Wm. Bangerter:		
"Furnishing material; carpentering; painting; fixing floors; arranging stock room to accommodate stock		\$532.00
"M. H. Jamison & Helper:		
Installing lights		20.00
"Maack Bros. Sign Company		
Window and Door signs		60.15
"'Drive It Yourself Company'		
Truck for moving stock		10.66
"Estimated Labor For Moving:		
36 Shifts for labor		250.00
"Lock For Front Door		2.75
"Photographs For Home Office		13.75

\$ 889.31

"Recapitulation

"Rent—Difference between old lease and new lease	\$660.00
"Remodeling & Moving:	
New quarters for office and stock	889.31
"Plumbing (Estimated)	35.00

\$1,584.31"

Cross Examination.

72 (By Mr. Clay:)

Q. Mr. Baird, according to this Exhibit 3 you have a total expenditure of \$1584.31?

A. I believe there was a correction there. \$1644.31 of this cancels.

Q. You say the total is sixteen—

A. Yes, sir. I think your paper shows six hundred dollars difference between the rent in the old and new; should be \$660. Makes a difference, a cancellation of \$1644.31.

Mr. Rich: What do you make that?

The Witness: \$1644.31.

By Mr. Clay:

Q. Mr. Baird, you filed a claim with the government on December 16, 1942, didn't you?

A. Yes, sir.

Q. And that was in the amount of \$615.58?

A. Yes, sir.

Q: You stepped it up a thousand dollars since that time. What items have you added since you filed your claim on December 16, 1942?

A. Our cost of moving and difference in the rental on the life of the two leases, our old and our new location.

Q. In the claim which you filed with the government in December you had installing water heater. Is that in this Exhibit 3?

A. Yes, sir; that is in the estimated cost of thirty-five dollars for installing plumbing and water heater.

73 Q. So do I understand it is now stepped up from \$5.40 to \$35?

A. That includes other plumbing. Not only water heater, but installed a lavatory and washbowl in our new location. We estimated those costs at thirty-five dollars. They haven't been installed yet.

Q. You would have been satisfied to settle in December for \$615.58, is that right?

A. Yes, sir.

Q. That is the claim you filed, and it was sworn to?

A. That was actual expenses, yes, sir.

Q. Sworn to by James A. Lind. Is he connected with your company?

A. Yes, sir.

Q. In what position?

A. As comptroller at our head office.

Q. How about this first item, \$532—"Furnishing material; carpentering; painting; fixing floors;"—? Are any items which you included in that December statement included in that \$532?

A. No, sir.

Q. Is that the same item you have in your affidavit of \$467.40?

A. Approximately the same, yes, sir.

Q. So you stepped it up from \$467.40 to \$532?

A. Yes, sir.

Q. You have "Maack Bros." here, sign painting, \$33.20 in the claim presented in December?

74 A. Yes, sir.

Q. Now you have stepped it up to \$60.15?

A. Yes, sir.

Q. Had the work been done at that time by Maack Brothers?

A. At the time Maack Brothers did the last work, the thirty-three dollars, I had part of our window sign on there; at our new location I had to put an entire new sign on the window. They remodeled the old sign for the thirty-three dollars.

Q. This thirty-three dollars that you paid Maack Brothers set out in your affidavit of December 16th, was that for work at the old location or the new?

A. The old location.

Q. And consisted of what?

A. Consisted of remodeling after we had signed the new lease in August at the Terminal Building.

Q. You mean after you had signed the new lease of the Terminal Building you had your sign remodeled?

A. Yes, sir.

Q. On the old building?

A. Yes, sir.

Q. This sixty dollars includes remodeling of your sign on that old building, and the work on the new building?

A. And stringing up a sign at the new building.

Q. Here you have thirty-six shifts for labor of \$250 on your Exhibit 3. That did not appear on your affidavit, did it?

A. No, sir.

Q. In your affidavit you have photographs of your office, \$11. And now have stepped that up to \$13.75.

75 Is that right?

A. Yes, sir.

Q. What were those photographs for?

A. After remodeling, photographs of the outside and the inside of our office and stock room.

Q. Of the new location?

A. Yes, sir, to send to our head office to show our company what we had done in the way of remodeling; what the place looked like.

Q. Took photographs of it?

A. Yes, sir.

Q. You think the government ought to pay for that?

A. We paid for it.

Q. Do you think we ought to pay for it?

A. Yes, sir.

Q. And you think we should pay for the thirty-six shifts of labor, \$250?

A. Yes, sir.

Q. You have an item here, \$889.31, "Remodeling & Moving". What does that \$889.31 comprise?

A. Remodeling at our present location, putting in partitions, making three offices, building stock room to handle our stock and putting a sign on the window and taking photographs of the interior to show our head office, and company employees' time in moving stock from the Terminal Building to our new location.

Q. Are all those items included in this \$889.31?

A. Yes, sir.

76 Q. Does it include the item of thirty-six shifts of labor, \$250?

A. Yes, sir.

Q. And all those items above?

A. Yes, sir.

Q. Now, your first lease that you had in the old location ran from December 1, 1939, to November 30, 1942?

A. Yes, sir.

Q. And that is signed by the Metropolitan Life Insurance Company as the lessor, Cochise Rock Drill Manufacturing Division of Independent Pneumatic Tool Company—that is your firm, is it?

A. It was at that time. Since that time the Cochise Rock Drill Company, a corporation of California, has been dissolved.

Mr. Clay: We would like to read into the record paragraph 12 of the lease just referred to, dated October 24, 1939.

(Reads:)

"If the whole or any part of the demised premises shall be taken by Federal, State, county, city, or other authority for public use, or under any statute, or by right of eminent domain, then when possession shall be taken thereunder of said premises, or any part thereof, the term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease."

77 Q. Now, the lease dated August 10, 1942, between the Metropolitan Life Insurance Company and the Independent Pneumatic Tool Company ran for a period of five years from December 1, 1942, to November 30, 1947?

A. Yes, sir.

Q. With a rental of forty-five dollars for the first two years?

A. First three years, I believe.

Q. First three years. And fifty dollars for the next two?

A. Yes, sir.

Q. And the same clause with reference to cancellation in case the property is taken by Federal, State, county, city or state or other authority for a public use or by Right of Eminent Domain, appears also in that lease, doesn't it?

A. Yes, sir.

Mr. Clay: There is another clause here, if your Honor will indulge me I would like to read it and see if it has any bearing.

This is on the lease dated July 6, 1942. I have heretofore referred to it as August 10, 1942.

The Witness: I believe August 10 is the official date of that lease. It was written up July 6, and was sent back for correction.

Mr. Clay: On the lease of August 10, 1942, there is a rider which I have not yet read.

78 Mr. Jones: What was the number of that last one you read?

Mr. Clay: 12, the same as the other.

This rider provides in the lease beginning December 1, 1942, and expiring November 30, 1947, as follows:

(Reads:)

"It is mutually agreed that the lessor and lessee reserves the option to cancel this lease on or after November 30, 1945 provided sixty days prior written notice of intention to cancel is given."

Q. That is correct, isn't it?

A. Yes, sir.

Mr. Clay: Mr. Baird, Mr. Jones has just called to my attention that figure should be \$1584.31 instead of 1644.

Mr. Jones: I think the correction was made in the total without the addition of the sixty dollars.

Mr. Clay: So the total is \$1584.31?

Mr. Jones: That is right.

By Mr. Clay:

Q. Mr. Baird, when you folks moved into the old Terminal Building did you have an office at that time in Salt Lake?

A. Yes, sir.

Q. From where did you move to that building?

A. From 143 South West Temple.

Q. And that was in the year 1937, did you say?

A. I believe it was. I wouldn't be sure.

79 Q. You were not here at that time?

A. No, sir. I was in and out of here, but I wasn't in here regularly.

Q. Whether or not there was available office space in the Dooly Building at that time you don't know?

A. No, sir.

Q. Where is the Water Works Equipment Company located?

A. About in the center of the block between West Temple and First West on Second South, a few doors west of the Mine & Smelter Supply Company.

Q. And they are on Second South?

A. Yes, sir.

Q. As you said, most of your business is done by going out and getting it—you have salesmen?

A. I have salesmen out, yes, sir.

Q. Of course, occasionally you do have customers come to your store, I take it?

A. Yes, sir.

Q. But in the main you have to go out and sell your product, don't you?

A. Yes, sir.

Q. And you call on the mines in Utah and in other states?

A. That is right.

Q. And on the railroads in Salt Lake City and other cities?

A. Yes, sir.

Q. So you do not rely upon your location to just pick up any chance business that you might get by a straggler dropping in, do you?

80

A. Not wholly, no.

Q. That is a very minor part of your business, isn't it?

A. Yes, I would say it was.

Q. When you sold to the Galligher Machinery Company I suppose you called on them?

A. Yes, sir.

Q. Carried samples with you?

A. No, sir.

Q. Does the customer ordinarily come to your store room to inspect your material or whatever you are selling?

A. Quite frequently, yes.

Q. Well, you have some regular customers, don't you? People that you call on in the trade regularly?

A. Yes, sir.

Q. They are not all in Salt Lake?

A. No, sir.

Q. They come to Salt Lake City and if they stop at the Newhouse Hotel or the Hotel Utah your present location would be about as convenient as the Terminal Building?

A. After they find where we are, yes.

Q. You have notified all your customers where you are, I take it?

A. We have tried to.

Q. Your firm is a national concern?

A. Yes, sir.

Q. It doesn't operate to any particular advantage to be right next door to a competitor, does it?

A. I think so, yes.

Q. Do some of your competitors have offices in the Dooly Building?

A. Yes, sir.

Q. Up on the upper floors, the second, third, fifth or sixth floors?

A. On the ground floor

Q. Are they all on the ground floor?

A. Yes, sir.

Q. None of them have offices upstairs?

A. No, sir.

Q. The Dooly Building is on Second South and West Temple?

A. Yes, sir.

Q. Are all your competitors located in the Dooly Building?

A. No, sir.

Q. Some are in other parts of the town?

A. One is about a third of a block north of Second South on West Temple, and one has recently moved to Fourth South and West Temple, on Fourth South near West Temple; I don't remember the number.

Q. West of West Temple on Fourth South?

A. No, east of West Temple on Fourth South.

Q. He is on Fourth South between Main and West Temple?

A. Yes.

Q. Who is that?

A. The Cleveland Rock Drill Company—near West Temple on Fourth South.

Q. Were they forced to move there from your location?

A. Their location was, I believe, the seventh floor of the Dooly Building. They had two offices. They wanted a street location, and that was the only thing available. That was my understanding.

Q. They got out of the seventh floor where they had

been for a number of years, and moved down on Fourth South?

A. Didn't have room enough upstairs; couldn't get their equipment. It was inconvenient to get up and down.

Q. Some four or five years ago weren't they right across from this building on Exchange Place?

A. I don't know. I wasn't here at that time.

Mr. Clay: I have almost run out of questions. Would the court mind adjourning?

The Court: I would like for you to get through. Whenever you can not think of a question, that is a good time to quit.

Mr. Clay: I think that is all, if your Honor please.

The Court: Any redirect?

Redirect Examination.

(By Mr. Jones:)

Q. Mr. Baird, referring you to paragraph 12 of the two Terminal Building leases, have you made any demand on your landlord, Mr. Richards, for anything he got from the government for these condemnation proceedings?

83 A. No, sir.

Q. And have you made any demand on the landlord at all?

A. No, sir.

Q. Was it the landlord who evicted you?

A. No, sir.

Mr. Clay: No dispute about that.

Mr. Jones: I don't know why you read that.

Mr. Clay: I think it is material.

Mr. Rich: This is between the landlord and the tenants, not between the government—

Mr. Clay: I think that is a legal question we might discuss.

By Mr. Jones:

Q. Did the landlord cancel your lease?

A. No, sir.

Q. Did he ever give you sixty days' written notice?

A. No, sir.

Q. Did you ever give him?

A. No, sir.

Q. Mr. Baird, with reference to this old claim that has been so designated of \$616.52, did that cover any of your costs of moving or your increased costs at the new location?

A. No, sir.

Q. That old claim covered solely the expenditures that had been made by your company at the old location?

A. Yes, sir.

Q. Your present claim is for expenses entirely in moving to the new location?

A. Yes, sir.

Q. And there are no duplications between them—they are not the same thing at all, are they?

A. No, sir.

Q. You have not included anything in the new claim that is in the old one?

A. No, sir.

Mr. Clay: I object to it as leading.

By Mr. Jones:

Q. Well, have you?

A. No, I have not.

Q. I wish you would tell me, did you have any talk with Mr. Clay before you filed this old claim?

A. Yes, sir.

Q. What did he tell you to do?

A. Suggested we have our attorneys write a letter filing a claim to the Army Engineers, and send him a copy.

Q. Did he tell you what to put in it?

A. He told us that we could—

Mr. Clay: I object to that; incompetent, irrelevant, immaterial, whatever I may or may not have said—might be a different construction on it—would not be binding on the United States Government.

The Court: I will say also any claim that was presented and not accepted is not binding.

85 Mr. Jones: I want to show he filed this because Mr. Clay told him to.

The Court: The government is not bound by what Mr. Clay does.

Mr. Jones: There was no materiality in producing the old claim, but it shows what Mr. Clay told him.

Mr. Clay: It goes to his credibility.

The Court: It makes no difference what purpose he may have filed it for; now that we are having a lawsuit about it, we will submit it on its merits.

Mr. Jones: May I be heard—One thing more—He says that goes to his credibility; he is trying to test his credibility for doing something he told him to do.

The Court: It might be a good ground for it.

Mr. Jones: I think that sufficiently appears now.

(Recess to Two P. M.)

Salt Lake City, Utah, Tuesday, March 30, 1943: 2:00 p. m.

86 The Court: You may proceed.

SAM BAIRD, the witness on the stand at the time of recess, thereupon was recalled for further examination, and testified as follows:

Redirect Examination (resumed).

(By Mr. Jones:)

Q. Mr. Baird, what was the date you moved out of your location in the old building, the location in the old premises on West Temple?

A. I think I moved out on November 17th.

Q. And you have been out ever since?

A. Yes, sir.

Q. And are now?

A. Yes, sir.

Q. On this claim you filed for the installation you had made at your old premises, have you ever been paid anything for that?

A. No, sir.

Q. Have you been paid anything for being moved out?

A. No, sir.

Q. Been offered anything?

A. No, sir.

Mr. Jones: I think that is all.

Recross Examination.

(By Mr. Clay:)

87 Q. Mr. Baird, calling your attention again to the leases, these two leases, the one dated August 10, 1942, and the one dated October 24, 1939, were between the Metropolitan Life Insurance Company and the Independent Pneumatic Tool Company, is that right?

A. Yes, sir.

Q. Now, I think, Mr. Richards acquired this property on October 16, 1942, from the Metropolitan Life Insurance Company. Do you know whether that is correct?

A. I don't know. I don't know when he took it over. Some time, I understand, during the month of October. I don't know the date.

Q. Will you state, please, if you had a written lease with Mr. Richards?

A. No, sir.

Q. Had you ever paid him any rent?

A. I don't know whether we paid rent to Mr. Richards or to the Metropolitan Insurance Company. We sent our rental to the Union Trust Company.

Q. When did you pay them—do you know what day of the month you paid the rent?

A. The rent was due the 1st of the month.

Q. Do you know to whom you paid the rent on the 1st of November?

A. I don't know definitely, no. I would say the Union Trust Company.

Q. They were the agents of the Metropolitan Life Insurance Company?

88 A. Yes, sir.

Q. And so far as you know they were not the agents of Mr. Richards?

A. As far as I know, they were not.

Q. On the back of the lease, which expired November 30, 1942, there is marked in leadpencil the word "cancelled". Do you have any idea who put that on there?

A. No, sir.

Q. Or you don't know when it was put on?

A. No, sir.

Q. Now, Mr. Baird, with reference to the conversation had in my office, let's see if you and I can agree on that. Was it about this way, that you came in and asked me whether or not you should file a claim in my office or in Mr. Stevens' office?

A. I think that was generally it; came in looking for information as to where to file a claim and what to do.

Q. Do you remember if I told you substantially that if you were going to file a claim at all, to file it in Mr. Stevens' office?

A. That is right—with a copy of the claim to your office.

Q. And send a copy to my office?

A. Yes, sir.

Q. Was that about in substance what was said?

A. I believe so.

Q. May I ask you, please, if you paid on November 1, 1942, the same amount of rent you had theretofore been paying?

A. Yes, sir.

Q. That is, forty-five dollars a month?

A. Yes, sir.

Q. And as you say, on the 1st day of November you paid that to the Union Trust Company?

A. That is my understanding, yes, sir.

Q. And on November 11, 1942, you did not have a written lease with Mr. Richards, the owner of the building?

A. No, sir.

Q. So far as you know this is the lease which expired November 30, 1942. I do not find it has ever been assigned to any one. Do you find any assignment there?

A. It has not, to my knowledge.

Q. It has not been assigned?

A. No, sir.

Q. To Mr. Richards or anybody else, so far as you know?

A. As far as I know, no.

Q. Do you know if the lease which became effective December 1, 1942, and expired November 30, 1947, was ever assigned?

A. To my knowledge it never was.

Q. So neither one of those leases was ever assigned by the Metropolitan Life Insurance Company to Mr. Richards or anybody else?

A. As far as I know they were not.

Mr. Clay: I think that is all.

Redirect Examination.

(By Mr. Jones:)

90 Q. This Union Trust Company is the Union Trust Company of Salt Lake, over on Third South and Main?

A. Yes, sir, Third South and Main.

Q. With reference to these leases, the last lease, the one from December 1, 1942, to November 30, 1947, had already been signed up and entered into in August of 1942?

A. Yes, sir.

Q. And you and the owner of the property, the then owner of the property, had already entered into your agreement through that lease?

A. We had reached a verbal agreement. The lease was signed by the vice-president of our company on our part, and I understand an official of the insurance company from the landlord.

Q. Were there other copies of this left in the possession of the Union Trust Company or the landlord?

A. Yes, there were two or three copies signed.

Q. What they did with their copies as to assignment, you don't know?

A. No, sir.

Q. You continued in possession until you were ousted by the United States?

A. Yes, sir.

Q. You were not ousted or requested to leave by Mr. Richards or any one else than the United States and this court?

A. No, sir.

Mr. Jones: That is all.

Recross Examination.

(By Mr. Clay:)

91 Q. I will ask you if you paid Mr. Richards any rent on the premises occupied by you since November 1st?

A. No, sir.

Q. You haven't paid the Metropolitan Life Insurance Company any rent since November 1st?

A. No, sir.

Mr. Clay: That is all.

CHARLES F. WIGGS, was thereupon called as a witness by and on behalf of the defendants, and having been first duly sworn herein, testified as follows:

Direct Examination.

(By Mr. Jones:)

Q. Your name is Charles F. Wiggs?

A. Yes, sir.

Q. Where do you reside?

A. 1152 Gilmer Drive.

Q. Salt Lake City?

A. Yes.

Q. How long have you lived here?

A. Since 1926.

Q. Are you in business in Salt Lake City?

A. Yes, sir.

Q. What business do you operate?

92 A. The business known as Chicago Flexible Shaft Company.

Q. Do you do business yourself under that name?

A. Yes.

Q. What is the Chicago Flexible Shaft Company?

A. It is a Chicago corporation that manufactures sheep-shearing machinery, animal clipping machinery, industrial furnaces, the Sunbeam line of electrical appliances, and two or three other things that we don't go into here. They are working exclusively now on war production.

Q. Are you the representative here for that company?

A. Yes, sir.

Q. What territory do you cover in your representation?

A. For the sheep-shearing machinery we cover the whole country west of Denver, between Denver and the Coast, and Montana and Arizona. This is the central distributing point for the whole territory.

Q. What about the other?

A. For the electrical appliances we have Montana, Wyoming, Utah, Idaho east of Weiser, Nevada east of Winnemucca, the western slope of Colorado.

Q. And that that you call Sunbeam electrical appliances?

A. Sunbeam mixers and toasters, razors, Shavemaster, and several other things.

Q. Was it furnaces you said?

A. Yes, sir.

Q. What furnace?

93 A. We don't handle those out here, because it is a thing for the east. I don't have anything to do with that. They have a big trade in industrial furnaces.

Q. Confining your attention to what you handle—you said the sheep-shearing equipment and the electrical appliances. Anything else?

A. Well, we have an agency for the Co-op Sheep Dipping Company; it doesn't amount to a great deal.

Q. That is all you handle for the Chicago Flexible Shaft Company, is it?

A. Yes, sir.

Q. Are those things?

A. Yes, sir.

Q. Where, on November 11, 1942, was your place of business?

A. 224-226 South West Temple Street.

Q. Is that in the old Terminal Building?

A. Yes, sir.

Q. On what floor?

A. Ground floor.

Q. What were the dimensions of your property in the Terminal Building at your old location? Before you give that, I point to the map, Exhibit 1, and indicate with the pointer what is marked on the map "Chicago Flexible Shaft

Company", in orange. Are those the premises that you occupied? Is that about the physical shape?

A. Yes, that is the place.

Q. Now, you may return to my other question and answer that.

A. The front of it was 25 wide, 94 feet deep.

94 Q. The front?

A. 25 feet wide.

Q. That is on West Temple?

A. Yes.

Q. Then it went west 94 feet?

A. Yes.

Q. What about the back?

A. There is nothing behind it.

Q. I mean the width of the back—says on the map 35?

A. 35 feet back. There was an offset of 11 feet by 55.

Q. It says 35 feet 6 inches. Is that about right?

A. Yes, sir.

Q. Then it comes east 39 feet, is that about right?

A. Yes, sir.

Q. And a jog to the south, and then on east to the West Temple entrance? That is about the shape of it?

A. Yes, sir.

Q. Do you have the area in square feet of that property?

A. Approximately 3000 feet.

Q. Did you move to a new location as a result of the proceedings here and under order of this court?

A. Yes, sir.

Q. About when?

A. The following Tuesday we were out.

Q. What date would that be?

A. I don't know.

95 Mr. Jones: The 17th?

Mr. Clay: I think the 17th.

Q. Where did you move to?

A. 46 to 50, West Fourth South.

Q. That is just across the street here?

A. Just behind the building.

Q. South?

A. Yes, sir.

Q. What are the dimensions of that property?

A. Approximately 44 feet by 100.

Q. What is it?

A. 44 feet by 100.

Q. That is, then, approximately 4400 square feet?

A. Yes, sir.

Q. I think you said you were on the ground floor?

A. Yes, sir.

Q. A two-story building?

A. On West Temple?

Q. In the old premises.

A. Yes, sir.

Q. And are you on the ground floor now?

A. Yes.

Q. What kind of building?

A. Flat-roof building with 44-foot front.

Q. How many stories?

A. Just the one.

Q. Mr. Wiggs, describe briefly to the court and jury what you did in your business at the old location in the Terminal Building?

A. Well, with an electrical line we supplied all the jobbers in the states I have already specified—in the territory I have given, with the sheep-shearing and clipping machinery. We sell from here—we have agents. Wherever it was twenty-four hours away by express I put in what I call a sub-agent, or distributing agent. We shipped that stuff at the beginning of the season, enough on an average to keep them supplied, and then as soon as the season was over they turned back anything they had left. In California it is different, because there they are shearing more or less all the year around. When an agent buys stuff there he pays for it, and that is the end of it. They don't return any stuff.

Q. Was California your territory?

A. Yes, sir.

Q. In that business, as I understand, your office or your location here was the headquarters?

A. Yes, sir.

Q. Did you carry any stock on hand?

A. Yes, sir.

Q. And what did that consist of?

A. Machinery—sheep-shearing machinery mostly—cattle clipping machinery as well.

Q. Any electrical appliances?

A. Yes, we used to carry reserve stock of all the electrical appliances we produced.

Q. Did you carry any repair shop?

97 A. We have a repair shop with four people here for repairing electrical appliances now.

Q. Any other service store or shop?

A. We have the office, of course.

Q. I mean for the handling of the repairs of any of the equipment except electrical?

A. No, sir. If there is any small stuff comes in to be repaired of a machinery nature, they repair it in the electric department, too.

Q. Does the electric department handle all repairs for everything?

A. Yes, sir.

Q. Was that a minor or substantial part of your business?

A. The electric department?

Q. No, the repair department.

A. It is a necessary part; it is not the biggest end of it.

Q. I want you to tell us. We don't know anything about it. What part that played in your business, the repairing end of it?

A. I haven't any separate figures. I never kept any.

Q. Would you say it was a necessary part here?

A. For the convenience of the public.

Q. Was that a feature of your other business, to keep this equipment in shape?

A. No, it was for the convenience of our customers throughout these five states.

Q. You say it was necessary. What I am trying to understand, was that a feature to your business?

98 Mr. Clay: I object to that as leading and suggestive.

The Court: He may answer.

Mr. Jones: Do you understand me?

A. It is a help to the business. Because if we didn't have it, have to send the stuff to Chicago to be repaired.

Q. So you say it was a necessary and essential part of your business?

A. Yes, sir.

Q. You employed four people in that department?

A. Yes, sir.

Q. How many employees have you altogether?

A. Seven.

Q. Seven?

A. Yes, sir.

Q. And how many did you have at the old location?

A. Seven.

Q. You are doing business with the same number of employees?

A. Yes, sir.

Q. Did you have any special equipment or any special set-up for your business at the old location in the Terminal Building?

A. We had to equip the repair department—most of the stuff that came from our factory in Chicago.

Q. Did you have that there?

A. Yes, sir.

Q. Was it all set up and used?

A. Yes.

99 Q. And necessary in your business?

A. Yes, sir.

Q. Did you have more than one room?

A. No.

Q. Was that partitioned off?

A. In the old place we had the office partitioned off from the warehouse or repair shop. That was the only partition in the place.

Q. That is the way you operated, with an office, a warehouse and repair shop?

A. Yes, sir.

Q. How much of a stock of goods did you carry on hand?

A. It varied with the season; probably an average the year around of fifty thousand dollars' worth.

Q. That was kept on the premises?

A. Yes, sir.

Q. And was it necessary to keep that amount of machinery and equipment on the premises?

A. The sheep-shearing machinery season is very tem-

porary; starts in Arizona in January, finishes in Montana in July. In that time we have to have a big stock. By the end of July I let it run down, and have to renew it again in January. But the electric business for the Christmas trade commences in August, and I had to carry an increasing stock up to Christmas. We probably had fifty thousand dollar stock the year around, average.

Q. That was necessary in your business?

100 A. Yes, sir.

Q. Was your business profitable?

A. Yes, sir.

Q. How long did you operate at the location in the Terminal Building?

A. 26 years.

Q. Did you have a written lease?

A. No, sir.

Q. How long had you operated there without a written lease?

A. The whole time.

Q. Never have had one?

A. No, sir.

Q. How many landlords have you had there?

A. Four.

Q. And what was your rent?

A. When we started in it was one hundred dollars a month, if I remember right. It was one hundred and twenty-five dollars after the first two or three years. And then it was going to be one hundred and fifty after that, but the 1921 slump came along, and I told them I would have to get out, because I couldn't pay the rent; business went down. They agreed to let it stand at a hundred dollars. It has been one hundred dollars ever since.

Q. You have paid one hundred dollars a month ever since 1921?

A. Yes, sir.

Q. That was your rental on the 11th of November, 1942?

A. Yes, sir.

101 Q. Was it your desire and intention to remain on at these premises indefinitely?

A. Yes, sir.

Q. Had you ever had any intimation or indication from

any one that that arrangement was not entirely satisfactory to the owners of the property?

A. No, sir.

Q. What was your average volume of business over the last three or four years?

Mr. Clay: Do you propose to show it decreased?

Mr. Jones: No, just to show the substantial nature of his business.

Mr. Clay: We think it is not material, and object to it.

The Court: The objection may be overruled.

Mr. Clay: Exception.

A. Our average sales from Salt Lake here probably one hundred thousand dollars a year. Probably sent in one hundred and twenty-five thousand dollars in orders to Chicago for shipment direct to the jobbers.

Q. What is your total volume of business average?

A. Combined, for the two?

Q. Whatever your business is.

A. Probably two hundred thousand dollars to two hundred and fifty thousand dollars a year.

Q. That is conducted from your office here?

A. Yes.

102 Q. You moved out, you say, and your removal was by virtue of these proceedings alone?

A. Yes, sir.

Q. Did you try to secure other premises?

A. I went all over this town, from the Union Pacific depot on the west to Third East on the east, and down to Sixth South on State Street.

Q. What did you find available?

A. All kinds of little stores about twenty-five feet wide and sixty or seventy feet deep, wanted from seventy to one hundred dollars a month; no heat in. I couldn't find a place anywhere that was suitable for us at all.

Q. Would those places have accommodated you in your business?

A. No.

Q. Did you finally find a place that would accommodate you?

A. Where we are now.

Q. I think you have given us the dimensions of that. Is that place sufficiently large to accommodate you?

A. Yes.

Q. You have more space there than you did at the other place?

A. Yes, sir.

Q. Could you do with less space than you have there?

A. Yes, sir.

Q. But that was all you could find?

A. That was the only place I could find in the town.

Q. When you first found that place, before you moved in, was it fitted up suitably for you to move into?

103 A. No, sir. It was in a very dirty shape.

Q. What other conditions did you have to remedy in order to occupy it?

A. The partition between the office and the warehouse was an old board proposition—it was in a very dilapidated condition with holes through the thing. It was a very dirty place all through. The toilets were a disgrace. How the city ever permitted them to be in the condition they were, I don't know.

Q. And did you have to do anything with the front of the building?

A. There was a run-way in the front; we put store window front in.

Q. What do you mean by a runway?

A. An automobile garage before we had it; they used to run automobiles in the back. We put in a store front.

Q. Was that necessary?

A. Yes, sir.

Q. What else did you do to it?

A. A whole lot. Do you want me to read it?

Q. By the way, have you with you your vouchers and bills and checks for all these items?

A. All except the electrician. We couldn't get him. He was away.

Q. You have them with you, if some one wants to see them?

A. Yes, sir.

Q. First of all, who was in possession there when you located it?

104 A. An automobile dealer named Carruthers.

Q. Did he have a lease on that?

A. Yes, sir.

Q. Have you that?

A. Yes.

Q. The lease was between this investment company of Colorado and C. N. Carruthers?

A. Yes, sir.

Q. For 46-50 West Fourth South, leasing those premises to him from the 1st day of May, 1941, until the 1st day of May, 1944, a term of three years?

A. Yes, sir.

Q. Did you negotiate with Mr. Carruthers to take over this lease?

A. Yes, sir.

Q. Did you take it over?

A. Yes, sir.

Q. And was it assigned to you by Mr. Carruthers?

A. Yes, sir.

Q. And approved by the investment company?

A. Yes, sir.

Q. The lease provides for the payment of one hundred and twenty-five dollars a month rent?

A. Yes, sir.

Q. Is that the rental you are now paying?

A. It is.

Q. And the rental you will be required to pay for the balance of the term until May 1, 1944?

A. Yes, sir.

Q. At your old location did your one hundred dollars a month include anything other than rent?

A. Included the heat and water, too, and watchman service.

Q. What does this hundred and twenty-five dollars a month cover?

A. Rent.

Q. Any heat?

A. No.

Q. Any water?

A. No.

Q. Any watchman?

A. No.

Q. Do you know what the heating bills per month are at your new location?

A. I do.

Q. What are they?

A. The first month I was in was thirty-nine dollars.

The second month, thirty-eight dollars.

And I had the furnace insulated and cut it to twenty-eight dollars the first month. This month it is twenty-seven dollars.

Q. Based on those months, and eliminating the summer months, have you averaged and estimated from those actual bills what the heating will be in addition per year?

A. Probably average twenty dollars a month the year around, I figure. Maybe a little more, maybe a little less.

Q. That would then be twenty-five dollars a month
106 more rent, and twenty dollars a month for heat in addition to what you were paying on West Temple?

A. Yes, sir.

Q. What about your water bills?

A. That is two dollars. Just paid a two-dollar bill—what it was for, I don't know.

Q. Assuming those are quarterly bills?

A. It is eight dollars the year around I presume; I don't know.

Q. You have approximately seventeen months that you can occupy that property under this lease?

A. Yes, sir.

Q. So you have seventeen times these expenditures for the amount that you have to pay over and above what you were paying in the old location?

A. Yes, sir.

Q. How about watchman service?

A. I don't have it.

Q. You don't intend to have it?

A. No, sir.

Q. That figures, then, a total of about—

A. Practically fifty dollars a month the year around.

Q. About fifty dollars a month for the seventeen months. is that what you say?

A. Yes, sir.

Q. That would be eight hundred and fifty dollars?

A. Yes.

Q. Is that what you figure?

107 A. Yes, sir.

Q. Have you more than one copy of this sheet you furnished me of your expenses?

A. Moving expenses?

Q. Yes.

A. I just have the one here. I gave you one.

Q. Do you have another one I could let Mr. Clay have?

A. This is the only two I have—that one, and the one you have. I can have some more made.

Mr. Jones: I will let you borrow mine, then, Mr. Clay. I will have another one made.

(Exhibit 4 was marked by the reporter for identification.)

Q. You have in your hand a copy of an exhibit which has been marked Exhibit 4, entitled "Chicago Flexible Shaft Company, Salt Lake City, Utah, Expense of Moving to New Location at 46-50 West Fourth South," showing various moving expenses totaling \$2,020.75?

A. Yes, sir.

Q. Are those expenses that you actually incurred and paid as a result of being required to move from the Terminal Building to your present location?

A. Every one of them; I have cancelled checks for every one of them right here.

Mr. Jones: We offer Exhibit 4, your Honor, for the same purpose as the others.

108 The Court: It may be received for that purpose.

Mr. Clay: We have no objection, of course, to a memorandum of the figures, but we object to the figures going in.

The Court: That is the same objection you have been making. It may be so understood.

By Mr. Jones:

Q. Mr. Wiggs, on that statement at the bottom I see you have marked "C. N. Carruthers, Incorporated, lease, \$500"?

A. Yes, sir.

Q. What does that mean?

A. We paid him five hundred dollars for him to vacate the building for us to go in.

Q. Paid him that for his lease?

A. Yes, sir.

Q. Is that in addition to the eight hundred and fifty dollar rental item?

A. Yes, sir.

Q. Then I notice you have on there—you have that check here in court?

A. You have that Carruthers check. I have the rest of them.

Q. You have "Earl Bennion, insulating." Is that the furnace insulating?

A. Yes.

Q. In your heating cost you have reduced that—

A. Ten dollars a month.

Q. Because of the eighty-one dollars you spent?

A. Yes, sir.

109 Q. You have an item of "Robert G. Gray, contractor, \$1085.05"?

A. Yes, sir.

Q. I wish you would tell the court and the ladies and gentlemen of the jury what that item is, and what you did to secure the services under it.

A. As soon as I knew we had to get out in a week, I knew we were in a desperate position. This man had done work for us before. I asked him if he would help us out. He said, "I will do everything you want me to do."

Q. Who is Gray?

A. He is a carpenter and contractor on West Third South.

Q. Is that his regular business?

A. Yes, sir, he is a carpenter over there, runs a shop.

Q. Does he have a staff of employees?

A. Yes, sir.

Q. What did he do?

A. He took hold of the whole darn thing. If he hadn't, I wouldn't have got through yet. He remodeled the show windows in front, reconstructed them, put in show windows

in place of the runway, enclosed the repair shop, constructed a new toilet, put in new shelving. We moved all the old lumber we could from the other place. The government gave their permission to take it out. They also helped wreck the old building.

Q. What do you mean by that?

A. I asked if we could move the stuff. Gray told me to get all the old lumber I could, because there was
110 priorities.

Q. You haven't put any of that in?

A. No, sir, not a bit.

He fitted up a new toilet, installed a new toilet and wash basin, installed hot water in the furnace room, and radiator in the repair shop.

The rug company came in—

Q. I am confining it to Gray.

A. He brought the painters in; they painted all the work that had to be done. The whole thing had to be painted.

Q. Were you personally familiar with all of these items?

A. Yes, sir, I was there the whole time.

Q. All the service performed by Gray?

A. Yes, sir.

Q. Did you get the best prices you could?

A. I didn't have time. I had to go to him, because I didn't know where we were at. I had confidence in him. He had done work for me before.

Q. Had it been reasonable?

A. Yes, sir, perfectly reasonable.

Q. What you secured here, was it reasonable?

A. Yes, sir.

Q. And was it necessary in order for you to occupy this property?

A. Yes, sir.

Q. Did you have any frills put in—anything that was not necessary?

A. Not a thing.

111 Q. I won't go into detail on the other items—wiring, flooring, signs, moving safe, grinding floor and moving fixtures—were those all performed and the services rendered as a result of your being required to move?

- A. Yes, sir.
- Q. Were any of them unnecessary?
- A. Not one.
- Q. Were they all reasonably necessary?
- A. They were all absolutely necessary.
- Q. And were any of the amounts charged out of line from what they should have been?
- A. Not that I know of.
- Q. Are you familiar with what was done?
- A. Yes, sir.
- Q. You know what you got for your money?
- A. Yes, sir.
- Q. And you feel you got value for your money?
- A. Yes, sir.
- Q. Mr. Wiggs, did I ask you if you were satisfied at your old location?
- A. Perfectly satisfied.
- Q. Had no intention of moving?
- A. No, sir.
- Q. Didn't want to move?
- A. No.
- Q. Is this new location the equivalent of what you had?
- A. In some respects yes, in other respects no.
- 112 Q. Tell us what you mean by that.
- A. We have a little more room in this place than in the other. We have a south front, and in the winter time when the sun is on the ground—immediately the sun hits the office it goes to 80 By midsummer we will be cooking in there.
- Q. You have a one-story, flat roof?
- A. Yes, sir.
- Q. What about the actual location of the place?
- A. Doesn't make any difference as far as the electrical business is concerned. The machinery business, it is quite serious.
- Q. Having to move from where you were?
- A. Yes, sir.
- Q. Why?
- A. Because we were right close to the Cullen hotel, which is headquarters for the stockmen and sheepmen in the country. The shearers and stockmen, start in Arizona in January and they work their way up here and finish

in Montana in July. Usually they stop in Utah and stock up on what they want, going north.

Q. Your place is half a block west—or was half a block west of the Cullen hotel?

A. Yes, sir.

Q. Now where are you—anywheres in that area?

A. Two blocks south.

Q. Do I understand from that testimony that these people in the shearing machine business, or who bought that sort of thing, that your place was sort of headquarters as they came through town?

113 A. Yes, sir, going north they usually stop off and buy everything they want so they can continue on their work.

Q. What advantage was that to your business, to be located near where they were?

A. Didn't have to hunt us up.

Q. They knew where you were?

A. Been there twenty-six years.

Q. In addition to these items of \$2,020.75, we must add the \$850 for rent and heat, and in addition to that. Mr. Wiggs, how did you move, do the actual, physical moving?

A. We tried to get the Salt Lake Transfer to take our work. They have done our work for twenty-six years. They absolutely declined, said they didn't have a wagon they could give us. I got the Howard Moving Company to do it, except the safe, the Salt Lake Transfer moved that for us.

Q. That is what these moving items are?

A. Yes, sir.

Q. During the period of moving from the old to the new location did you use any of your staff exclusively in the moving operation?

A. Yes, sir, every one of them.

Q. For about how long a period of time?

A. Started moving on a Tuesday, finished the following Saturday-week.

Q. How long is that?

114 A. Ten or eleven days.

Q. During that period did you pay them their regular salaries?

A. Yes, sir.

Q. And their services were rendered exclusively in moving?

A. Yes, sir.

Q. And none of them in your regular business?

A. No, sir.

Q. What does that amount to?

A. \$544.

Q. That must be added to the other two items in order to reach your actual out-of-pocket expenses?

A. Yes, sir. Also had a couple of them on overtime when we got moved, to catch up with the work. I haven't charged that up to the government, at all.

Q. Have you totaled these—will you total those for me, so we get right? I get \$3,414.73 as your actual out-of-pocket expenses. That is \$850 increased rent and heat;

\$544 employees

\$500 bonus for the lease

And 1520.75 for the renovating cost.

A. Yes, sir.

Q. Making a total of \$3414.73.

A. I haven't figured it up. I presume that is all right.

Q. As your actual out-of-pocket expenses?

A. Yes, sir.

Q. Necessitated by this move?

A. Yes, sir.

115 Q. By the expenditure of that money have you secured any more than you had at the old location?

A. Not a thing, except a little extra room that I don't need.

Q. And that place was, as I understand, the only one you could find?

A. Yes, sir.

Q. Mr. Wiggs, if you had been in the mood to move, if the right offer were made to you, willing to move, would you have moved on November 11, 1942, from where you were to where you are, if some one had given you thirty-five hundred dollars to do it?

A. No, sir.

Mr. Clay: We object to it as immaterial, if your Honor please.

The Court: His answer may stand.

Mr. Clay: Exception.

The Court: You asked him, "if". But he says he did not want to move. Put it affirmatively. He moved because he had to.

Q. Have you been paid anything for your out-of-pocket expenses by the government?

A. No, sir.

Mr. Clay: There isn't any issue on that, Mr. Jones. Why do you keep asking it?

The Court: The government will admit it has not paid anything.

116 Mr. Clay: Surely.

Mr. Jones: If the government had come in in the beginning and said, We haven't paid you and are not going to pay you, haven't hurt you—we wouldn't have asked it.

The Court: That is what you have in this lawsuit.

Mr. Jones: The government did in the other cases make some tender. The jury had something to go on. The government had gone part of the way—

Mr. Clay: I object to counsel arguing the case. No issue here.

The Court: That is true enough, but we will wait and discuss that when we get through.

Mr. Jones: With that stipulation of the government, we are satisfied.

Will you also stipulate you have never offered us anything?

Mr. Clay: I will stipulate I personally have not.

Mr. Jones: That the government has not?

Mr. Clay: I don't know.

By Mr. Jones:

Q. Has the government or any representative of the government offered you anything?

A. No, sir.

Q. You and you alone, without partners, are the Chicago-Flexible Shaft Company here?

A. Yes, sir.

Mr. Jones: You may cross-examine.

117 (Exhibit No. 4, offered and received as a summary of the evidence of Mr. Wiggs, is in words and figures as follows:)

"Exhibit 4.

"Chicago Flexible Shaft Company
Salt Lake City, Utah

"Expense of Moving to New Location at 46-50
West 4th South:

"Howard Moving Company	Moving Fixtures	74.00
"Utah Terrazzo Company	Grinding floor	20.13
"Salt Lake Transfer Co	Moving Safe	18.00
"Maack Brothers	Signs	36.00
"I. & M Rug & Linoleum Co	Flooring	142.29
"Sharp Electric	Wiring	64.08
"Robert G Gray	Contractor	1085.05
"Earl Bennion	Insulating	81.20
"C N Carruthers, Inc.	Lease	500.00
Total		\$2020.75
"Increased rent and heat for balance of assigned lease for 17 months		850.00
		•6
		75
"Employees used exclusively in moving, ten days payroll		544.00
		<u>\$3414.75"</u>

Cross Examination.

118 (By Mr. Clay:)

Mr. Jones: We will have to put those additional items on this sheet, too, as was suggested with the other.

The Court: Make them complete before you are through.

Q. (By Mr. Clay) Mr. Wiggs, I notice here on the memorandum attached to the lease on your new premises that

*Figures in italics in pencil on copy.

your lease was filed with your home office in Chicago, is that right?

A. Yes, sir. Mr. Wright, the president of the company, came out as soon as he knew we had to move.

Q. Did you have to get the consent of your home office before you entered into—or before you bought this new lease from the Carruthers Company?

A. I have an arrangement with the company that I can terminate my connection with them any time they like, and they will always buy me out at the price for the stuff I paid for it. I don't expect to be with them for the length of that lease. So I telegraphed to Mr. Wright. He came out. And he is prepared to take up that lease whenever I quit. That was the reason it was endorsed by Chicago.

Q. The five hundred dollars which you paid for this lease, was that money out of your own pocket?

A. Yes, sir.

Q. Or out of funds of the Flexible Shaft Company?

A. Out of my own pocket.

Q. There is a provision in the lease here that \$225—"receipt of which is hereby acknowledged, to apply on 119 the first and last month of the three-year period for rent, the balance of the rent to be paid monthly on the first day of each and every month thereafter until the full amount of said lease is paid commencing May 1, 1941, one hundred dollars per month for the first year and one hundred and twenty-five dollars per month for the next two years."

Did the five hundred dollars which you paid for this release—I assume that included the last month's rent of these premises?

A. I paid the rent from some time in November to Gaddis. We gave them a check for one hundred and twenty-five dollars for the month, then I gave him a check for one hundred and twenty-five dollars for the last month we would be in business—that was two hundred and fifty dollars altogether I paid them at that time. That was for two months, the first month and the last month I was in the place.

Q. Then did you pay five hundred dollars besides that?

A. Yes, sir—paid Carruthers five hundred dollars.

Q. So the five hundred dollars you paid Carruthers did not include this last month's rent?

A. No, sir.

Q. I suppose Mr. Carruthers was refunded the last month's rent?

A. I don't know what happened to Mr. Carruthers.

Q. You spoke of some property having been stolen, did I understand you to say?

120 A. The only thing is, he left a steel I-beam; must have weighed five hundred pounds. It was in the way. We put it in the back, in the lot at the back. I told him what we had done. We couldn't have it in there. It laid there until March 3rd, when I noticed that it had gone.

I telephoned his house to tell him.—He is in the hospital sick, I understand—that the thing had gone. I wanted to know whether we should report it to the police. I never heard anything more about it.

Q. I didn't understand your purpose of testifying about some property being stolen?

A. I didn't testify to anybody about it.

Q. I thought you said it was stolen?

A. I presume it was stolen. Some one took it. They said they didn't know who it was.

Mr. Jones: You didn't testify to it in your direct examination?

The Witness: No.

Mr. Clay: I thought he said something was stolen.

Mr. Jones: Stored.

A. I think you were referring to this I-beam that was left behind by Carruthers.

By Mr. Clay:

Q. You say you used your whole staff in moving?

A. Yes, sir.

Q. How many did you have employed?

A. Seven, and the stenographer. I sent the stenographer home.

121 Mr. Clay: I didn't get your answer, Mr. Wiggs. You had seven employees—did you have seven employed including your stenographer?

A. Yes, sir; that was including myself, too.

Q. How many people were engaged in helping you to move out of the seven, including yourself?

A. Six of us.

Q. Including the stenographer?

A. I told her to go home and stay there until we called her.

Q. She didn't help move?

A. No, sir.

Q. So there were five besides yourself?

A. Yes, sir.

Q. Helped move?

A. Yes, sir.

Q. Are you charging your time up, too?

A. Yes.

Q. How much do you figure your time is worth?

A. \$138.50.

Q. For your time?

A. Yes, sir.

Q. For how many days?

A. It was Tuesday, Wednesday, Thursday, Friday, Saturday, and the next week, too—eleven or twelve days. I allow myself three hundred dollars a month salary out of the business. If anything left, I take it. I figure my salary was three hundred dollars a month.

122 Q. So you paid yourself approximately eleven dollars a day for moving?

A. \$138.50.

Q. How much did you pay the other people?

A. Do you want a list of all of them?

Q. Did you pay them different amounts?

A. Yes, sir.

Q. In other words, you paid them their full salary?

A. Yes, sir.

Q. If you had a ten-dollar-a-day man you paid him for doing four dollars a day work?

A. I paid him ten dollars a day. If I hadn't done, he would have gone to the Arms Plant or somewhere.

Q. You did that not so much for the value of his services as a moving man, but because you didn't want to lose him?

A. Certainly.

Q. You didn't really think his services for moving were worth ten dollars a day, did you?

A. All depends. Some of them were. We have several

thousand dollars worth of different kinds of machinery there. If we hadn't known some man who knew where to put it, we would have been in fine shape.

Q. You have never been in the moving business, yourself?

A. No, sir.

Q. Twenty-six years you have been a salesman and executive?

A. Yes, sir.

123 Q. Office manager. You wouldn't classify your services as a mover at eleven dollars a day?

A. I didn't get that?

Q. I take it you wouldn't classify your services as moving man at eleven dollars a day?

A. No, sir.

Q. You just want the government to reimburse you for your time. Are you using all the space where you now are?

A. Yes, sir.

Q. And per square foot you are paying about the same as you paid in your old location, aren't you?

A. Yes, sir.

Q. When you first moved into the Terminal Building you paid one hundred dollars a month?

A. Yes, sir.

Q. Then they wanted to increase it to one hundred and twenty-five dollars, and you paid one hundred and twenty-five dollars for two or three years?

A. Yes, sir.

Q. Then about 1921 when your business got dull, you told them if they didn't reduce your rent you would move?

A. I went around and told them the position we were in. They said let the thing stand as it was.

Q. You said if they didn't reduce the rent you would have to move?

A. I presume I did. It is twenty-odd years ago.

Q. You didn't have a lease at the old Terminal Building?

A. No.

124 Q. If you had a right to move, by the same token they could have asked you to move, couldn't they?

A. I presume they could have done.

Q. If your landlord, Mr. Richards, had asked you to move and you had moved under the same circumstances

do you think Mr. Richards should have paid you \$3,414 for moving?

Mr. Jones: We object to it as irrelevant and incompetent.

The Court: It is argumentative, too.

Mr. Clay: I want to find out if he is going to treat the government any differently than the landlord.

The Court: I am ruling against you on that. You will have to take your medicine, and except to the court's ruling.

The government isn't Mr. Richards; it has put Mr. Richards out, too.

By Mr. Clay:

Q. Did you ever pay Mr. Richards any rent?

A. Paid him one hundred dollars a month for the first month I was in there.

Q. Mr. Richards, I mean?

A. Mr. Richards?

Q. When did you pay him that rent?

A. Between the 1st and 5th of November.

Q. For the first month after you were there?

A. We were in the old building; he took it over. We were there a month. We wrote to him and asked him if he would refund anything. He remitted fifty dollars.

Q. On the 1st of November you paid him one hundred dollars for the rent?

A. Between the 1st and 5th.

Q. When you moved out, about the 17th of November, he refunded one-half the rent to you?

A. Yes, sir.

Q. Have you given us credit for that fifty dollars?

A. I don't know whether I have or not. We didn't get paid for it until some time this year.

Q. Mr. Wiggs, you signed the answer that was filed in this case on February 13, 1943, did you not?

A. I don't know what you mean.

Q. This is your signature?

A. Yes, sir.

Q. And that is on the answer that was filed in this case on the 13th of February, 1943?

A. Yes, sir.

Q. And sworn to by you?

A. Yes, sir.

Q. And in that answer, filed February 13, 1943, you set up a total damage of thirty-one hundred dollars, didn't you?

A. I am sure I don't know what it was then.

Q. Thirty-one hundred dollars.

A. Yes.

Q. And since that time you have increased it from that to thirty-four hundred dollars. Is that right?

126 A. I haven't the figures here. I presume it is right.

Q. You have a total of thirty-four hundred—

A. That doesn't include the wages I paid.

Q. I didn't ask you that.

You have increased it from thirty-one hundred dollars to thirty-four hundred dollars?

A. I don't know, I am sure.

Q. You have here \$2,020; and for rent, \$850—

A. Excuse me just a minute. \$2,020.75 for actual moving and Carruthers.

Q. And \$544?

A. For employees' pay while moving.

Q. And \$850 difference in rent and heat?

A. Yes, sir.

Q. Making \$3414.75?

A. Yes.

Q. Where does the increase come in? Is that some expense you have incurred since you filed this February 13th?

A. I believe it is expense I didn't figure on, because we didn't take into account the extra expense we should have for the length of the lease—that is, fifty dollars a month.

Q. Some expense you are going to have in the future?

A. As long as the lease runs—for the fourteen months, whatever it has to run.

Q. In your answer you set up fifteen hundred dollars for moving, installing and equipping at your new location; and now you testify it amounts to two thousand dol-
127 lars?

A. Because we didn't put Carruthers' price in. It is \$1520.75 without \$500 we paid to Carruthers.

Q. In the paragraph above you say you had to pay a

bonus to the occupying tenant of five hundred dollars, which this defendant paid. So you included that in the fifteen hundred dollars.

A. No, sir, it is not included. I paid \$2,020.75 actual moving expense, including the five hundred dollars I paid to Carruthers.

Q. At any rate, it has been stepped up to three thousand dollars since February 13, hasn't it?

A. I am sure I don't know. I haven't the figures here.

Q. You know that is in the figures you have given today, don't you?

A. I don't know. I haven't got them here. I have the figures of actual expenses. I haven't put a penny into the thing more than I actually expended.

Q. But you have been liberal in your estimate, haven't you?

A. I have not.

Q. Did you have a watchman at the old location?

A. Yes, sir.

Q. Employed to watch the old building?

A. He was employed by the Dooly people.

Q. And not by the Metropolitan Life Insurance Company?

A. Not that I know of. Maybe after they took the building over they employed him. I don't know.

Q. The Metropolitan Company was your landlord, wasn't it?

A. As far as I know. We paid our rent to the Union Trust people. That's all I know about it.

Q. Don't you know the life insurance company was the owner?

A. I heard they bought it. I don't know anything more about it than that.

Q. So your landlord did not furnish watchman service in the old building? If it was furnished, it was by the Dooly building?

A. I don't know who furnished it. We had it, although never saw the watchman.

Q. In giving your estimate of the heat you said thirty-nine dollars the first month. Was that in November or December?

A. Yes, sir.

Q. Thirty-eight dollars in January?

A. Yes, sir.

Q. Then you said you did something to reduce it?

A. I had the furnace covered with wool insulation.

Q. To retain the heat?

A. Yes, sir.

Q. And your bill dropped to twenty-eight dollars?

A. Cut me ten dollars a month.

Q. Don't you think it will continue around twenty-eight dollars or twenty-seven dollars in the future since you have had it insulated?

A. Don't suppose it will be any higher than that.

Q. How many winter months do we have here?

A. I know at my home we start heating there in September, finish up in May—sometimes into June.

Q. You don't use a great deal of heat in September and May?

A. We use a corresponding amount in this place.

Q. Don't you think if you would average about twenty-five dollars a month for six months you would come closer to it than the average you give?

A. I don't know—a few dollars difference.

Q. If you averaged twenty-five dollars a month for six months you would have one hundred and fifty dollars a year instead of two hundred and forty dollars a year—the figure you give.

You don't think it will average two hundred and forty dollars for heat, do you, in the building where you are?

A. You have got to figure starting heat in September and run through to May, especially if you employ women. Because they want heat where men don't. Only about four months of the year you can figure you don't need heat. Got to have it all the time.

Q. Four months when it is good and hot?

A. It is going to cook us there.

Q. I didn't get clear in my mind who it was that you called in to do some work for you, and you left everything in their hands.

A. That is a carpenter over on Third South.

Q. Did you say Mr. Gray?

A. Yes. It is his business.

Q. Is the work which Mr. Gray did for you and the expense in connection with it represented on the Exhibit 4 with the exception of the bonus?

A. Yes, sir. Here it is. He took care of the painting and the carpenter work, and I have forgotten what else.

Q. What is this Robert Gray, \$1085, contractor? Is that the amount you paid him in addition to the amount you paid for grinding floors, moving safe?

A. Yes, sir. That was his part of the work.

Q. The I & M Rug Company, \$142, flooring?

A. We paid them that much. It was cement floor in front. We couldn't work on that floor. It was partly covered with paint, partly not. We had to have the paint ground off before we could put linoleum down.

Q. This represents the linoleum?

A. Yes, sir.

Q. I suppose the \$142.29 that was paid for linoleum—that linoleum will last a good many years?

A. I hope so.

Q. Twenty or thirty years?

A. I can't say about that.

Q. You think the government ought to pay for putting new linoleum on your floor down there?

A. If they hadn't forced us to come out of there, we wouldn't have had that expense.

Q. You do think they should pay you for that linoleum that you may use for many years to come?

A. I don't see why they should not. We wouldn't have bought it if we hadn't had to move.

Q. You would have had some expense at your old location, wouldn't you?

A. I had linoleum up there, but it wasn't suitable for down here. We have it rolled up in the back.

Q. Wasn't satisfactory because you had used it twenty-six years?

A. No, I hadn't.

Q. How long?

A. About three years. I bought a piece of double linoleum. I paid fifty dollars for it—to cover a piece of the office.

Q. It was almost worn out?

A. No, it wasn't nearly worn out.

Q. Wasn't worth much?

A. It is over in the back there now.

Q. Wasn't fit to use in your office?

A. It was good to put down. It is only half a block away. You can examine it if you like.

Q. With reference to this sheepmen stopping at the hotel in Salt Lake, and used to be half a block away from the hotel and now you are two blocks—

A. Yes, sir.

Q. Did you go to the hotel to call on them, or did they come to your place?

A. They came to see us.

Q. Have you sent out notices of your new location?

A. I sent out five thousand letters and didn't charge Uncle Sam anything for doing it.

Q. Any reason why these stock men who stop at
132 the Cullen Hotel wouldn't come down to Fourth South as well as Second South?

A. We were on Second South; we are on Fourth now.

Q. Any reason why they couldn't come down to Fourth South as readily as Second?

A. The sheep men wouldn't. The shearers may.

Q. Did they all stop at the Cullen?

A. They stop around there; two or three hotels around there. Stockmen's headquarters around there.

Q. In your business, whether electrical business or machinery business or whatever it is, you have to get out and get your business, don't you?

A. It doesn't come to me; never do any business that way.

Q. So regardless of whether you are on South Temple or Fourth South, you would have to hustle to get your business?

A. Yes, sir.

Q. Are there any manufacturing agents in the same block with you?

A. Now?

Q. Yes.

A. I don't know. I haven't paid much attention. Some outfit west of us, something to do with Timken Bearings.

Q. Isn't there a firm across the street from you that *manufacturers* furnaces, or jobbers for furnace people?

A. I don't know. We don't have anything to do with the furnace business out here. That is eastern business, foundries and all that kind of thing.

Q. In that block where you are it is occupied by
133 businesses of a mechanical nature, isn't it?

A. One other concern, something to do with Timken Bearings; across the street is this Cleveland Rock Drill Company.

Q. Next to them are these furnace people? Have you noticed them?

A. No, sir. I thought it was all automobile places.

Q. Did you say you were also agent for some sheep dip company?

A. Yes, sir. Co-op Sheep Dip Company.

Q. You represent them, do you?

A. Yes, sir.

Q. You are their agent, the same as you are for the Flexible Shaft?

A. Yes, sir.

Q. I take it some of the expense incurred by you in probably for and on behalf of the Sheep Dip business?

A. Not a thing.

Q. All for the Flexible Shaft?

A. Yes, sir.

Redirect Examination.

(By Mr. Jones:)

Q. Mr. Clay asked you if you hadn't made a very liberal allowance in your expenses. You didn't make the allowance at all, did you? You simply put in there what you were charged?

A. You mean for the wages I paid my men?

Q. For the expense of moving.

A. I just put in what we were charged.

Q. You didn't make the charge? You paid what
34 you were charged?

A. Not of any kind at all.

Q. On this heating business. You went in in December?

A. Yes, sir.

Q. So you have December, January, February, March, April and May—they are all heating months, aren't they?

A. Yes, sir.

Q. Then there is June, July and August, and you start in again, September, October, November, December, January, February, March, April, May—and your lease expires?

A. Yes, sir.

Q. So out of seventeen months, fourteen of them are heating months?

A. Yes, sir.

Q. That is how you arrived at your allowance for heat?

A. Yes, sir. I might state, my house is heated with gas. I could heat that for twenty-five dollars a month. When I had to pay thirty-nine dollars a month for this place, I knew something was wrong, so I had the insulation put in.

Q. In your original complaint, that was filed before you had insulated the furnace?

A. I presume so.

Q. And after you insulated the furnace and determined your actual heating cost and added the months up, you figured your actual rent for seventeen months, and you filed an amended complaint by permission of the court?

A. I presume so—I don't know.

Q. Is that your understanding?

135 A. I don't know much about it, to tell you the truth.

Q. That was the fact, wasn't it? Never mind your understanding—that was the fact?

Mr. Clay: I object to it as leading and argumentative.

The Court: We will take notice of what is in the pleading and the date of it.

By Mr. Jones:

Q. There was one thing I maybe misunderstood Mr. Clay—on Exhibit 4 I understood him to say everything in there with the exception of Carruthers' bonus was paid to Gray?

A. Oh, no.

Q. You didn't mean that, did you?

A. No.

Q. The items were paid to the persons indicated on the exhibit, weren't they?

A. Yes, sir.

Mr. Jones: I think that is all.

Recross Examination.

(By Mr. Clay:)

Q. I understand you now that you paid the five hundred dollars on the lease and not the Flexible Shaft?

A. I paid it.

136. LIONEL E. BOOTH, was thereupon called as a witness by and on behalf of the defendants, and having been first duly sworn herein, testified as follows:

Direct Examination.

(By Mr. Jones:)

Q. Your name is what?

A. Lionel E. Booth.

Q. Where do you reside, Mr. Booth?

A. 1445 Gilmer Drive, Salt Lake City.

Q. Are you in business in Salt Lake City?

A. Yes, sir.

Q. What is the nature of your business?

A. I am with the Galligher Company.

Q. One of the defendants in this case?

A. Yes.

Q. What is your position with that company?

A. Vice-president.

Q. What is the business of the Galligher Company?

A. We deal in mine and mill supplies and equipment and metallurgical services, manufacture metallurgical equipment and maintain an engineering department.

Q. Will you speak a little louder?

A. Maintain an engineering department, a metallurgical laboratory, manufacture mining and milling equipment.

(Last answer read by the reporter.)

Q. What kind of mining and milling equipment do you mean, Mr. Booth?

137. A. The principal equipment we manufacture is concerned with the treatment of ore; flotation ma-

chines, automatic ore samplers, reagent feeders, laboratory equipment, a miscellaneous number of items, and also rubber-covered—vulcanized rubber and metal.

Q. Where were the headquarters of your company on November 11, 1942?

A. 228 to 232 South West Temple Street.

Q. In this city?

A. Salt Lake City.

Q. What were the dimensions of your property at that place?

A. At the old location the approximate inside dimensions were 52 by 94, which gave us an area of 4,888 square feet.

Q. Did you move from there as a result of the court's order in these proceedings?

A. Yes, sir.

Q. About when?

A. About the 21st of November, 1942.

Q. Are you completely out of that place now?

A. Yes, we are completely out of it.

Q. Where did you move to?

A. We moved to 176 South Second East, the corner of Motor Avenue and Second East.

Q. What are the dimensions of your present location?

A. The new location—the ground floor, the one we occupy, is 72 by 55, with 3,960 square feet.

Q. Do you have any other occupancy there—occupy
138 any other space?

A. At the new location?

Q. Yes.

A. We have a mezzanine floor which we utilize.

Q. Is that included in your list at the new place?

A. That is included.

Q. Have you any area for that?

A. That is an area of 2750 square feet.

Q. That is the mezzanine. Do you utilize the mezzanine?

A. We utilize it to some extent, as far as we can.

Q. What do you mean by that?

A. We don't have as full use of it as if it were on the ground floor. Obviously, we can not have office workers segregated from each other unless we can establish a department up there, self-contained. We have on the mezzanine the drafting department, and that is about the only

office workers we can have up there. The other office we have up there is devoted to men that are out of the city most of the time.

Q. May we put it this way—Are you utilizing the mezzanine to its full capacity for your purposes?

A. Yes, as far as we can.

Q. How much of that do you use—one third—half?

A. We probably use about—for other than storage we probably use about half of it.

Q. Do you store in the other half?

A. We store office records.

Q. Coming back to your old premises at the Terminal Building, how long has the Galligher Company been located in that location, at that place?

A. For eighteen years.

Q. And what rental were you paying on November 11, 1942?

A. One hundred and fifty dollars per month.

Q. How long had you paid that rent?

A. At least ten years.

Q. Did you have a written lease?

A. No, we did not have a written lease.

Q. How long had you occupied that property without any written lease?

A. Eighteen years, so far as I know.

Q. Were your premises at the old location specially equipped and planned and set up for your particular uses?

A. They were very well adapted to our uses, and we had made certain alterations in there that made them more adaptable.

Q. Tell us what they were.

A. We had installed a separate drafting room by putting in partitions, and several other private offices that could be used for dictation. We had installed a cooling system at our own expense.

Q. What do you mean by that—a cooling system?

A. An air-conditioning unit for the summer months.

Q. You had installed that at your own expense?

A. Yes, sir.

Q. What else?

140 A. We had put in, in addition to those offices mentioned, we had also put in linoleum within the past two years.

Q. Did you have to have any particular kind of telephone connection or lighting?

A. Yes. We had also installed telephones throughout the offices for individual desks.

Q. Had your company done that itself?

A. Yes.

Q. And what about any lighting?

A. We had furnished individual desk lights, fluorescent lights.

Q. How large a staff have you?

A. We have a total of forty-four.

Q. And did you have at the old location?

A. Forty-four.

Q. Mr. Booth, is your business local?

A. It is local and international.

Q. Just explain to the court and jury what you mean by that.

A. Our general equipment that we sell locally is a local business. The equipment of our manufacturing and engineering service is international; that is, we sell equipment and engineering service throughout the United States, Canada, South America and foreign countries—South Africa.

Q. You have business dealings in machinery, mining machinery and equipment, and in rendering engineering services in the United States, South America, Africa, as well as locally?

A. Yes, sir.

Q. Any in Alaska?

A. Yes.

141 Q. So that your firm does business all over the mining world?

A. That is correct.

Q. And has that been the nature of its business for how long?

A. It has been the nature of the business for a great many years. It has been increasing in importance for ten years.

Q. Is the business profitable, and was it on November 11, 1942?

A. It was reasonably profitable.

Q. What is the average volume of your business over the past three or four years.

A. Well, it is running something over a million dollars.

Q. Did your company while at the old location advertise nationally or internationally or locally?

A. We advertised locally and internationally in the trade magazines; we advertised in South Africa.

Q. Did your advertising have any connection with your location?

A. All of our advertising requires—not all of it, but practically all of it requires electrotypes or copper cuts on which we have the address of our company and quite often a picture. Some of these bulletins we distribute internationally show pictures of the building.

For instance, there is one (indicating). And that shows the street address. This gives the street address, pictures of the building and showing the location, like this one (indicating).

Q. This page you have given me?

A. That is indicative of the rest of them.

142 Q. That is indicative of all of them?

A. Yes, sir.

Q. And are the interior views as well as the exterior views of your company at the old location?

A. That is just a view of the exterior. The other views are of the laboratories, and so forth. Some of them are our shops where we have work done.

Q. These two on this page (indicating)?

A. One is our laboratory; the other is at a shop we have work done.

Q. Which is your laboratory?

A. The right-hand corner.

Q. Was that at the old location?

A. No, that is located on Eighth South; 545 West on Eighth South.

Q. These pictures, are they illustrative of the nature of your business to the extent shown in the pictures?

A. Yes.

Mr. Jones: For the purpose of illustration, your Honor, and to show the exterior of the building, we will ask to have this marked.

(Exhibit 5 was thereupon marked by the reporter for identification.)

Mr. Jones: We offer the same for the purpose of illustration.

Mr. Clay: As I understand the answer, I understood the three pictures on this exhibit, only one of the three
143 shows the location in the Terminal Building. Is that right?

Mr. Jones: That is right. The other is just illustrative of the machinery business.

Mr. Clay: That they are not a view of the business of the Galligher Company?

Mr. Jones: The bottom one is, but not at that particular place.

The Witness: 545 West on Eighth South.

Mr. Clay: The top one is what?

Mr. Jones: It is a shop where they do electric work.

Mr. Clay: I think it should not be admitted. I think it does not serve any purpose. I object to it as immaterial, irrelevant and it is not competent and is misleading.

The Court: I will sustain the objection on the ground it is immaterial as to the appearance of the building and set forth.

Mr. Jones: We will offer Exhibit 5, then, your Honor only for the purpose—

Mr. Clay: We have a photograph of it, if you would like to have it.

Mr. Jones: With the name Galligher Company on it that is all I want. This suits me better.

We will withdraw Exhibit 5 and ask that this be Exhibit

144 The Court: Is it a photograph of part of the Terminal Building, shows the Galligher sign?

Mr. Jones: Yes.

The Court: Photograph of the location?

Mr. Jones: That is right.

The Court: No objection?

Mr. Clay: No objection.

The Court: May be received.

(Substitute Exhibit 5 was thereupon marked by the reporter.)

By Mr. Jones: Q. Is that the appearance of your building as it appeared on your advertising generally?

A. Yes.

Q. For how long a period of time, Mr. Booth, has your advertising been identified with a picture of your location in the Terminal Building?

A. As far as I know, it has been eight years.

Q. Were your premises on West Temple suited to your purposes?

A. Yes, they were quite satisfactory.

Q. Had you any desire to move?

A. None whatever.

Q. Would you have stayed indefinitely but for this proceeding?

A. Yes, we would have.

Q. Had you ever had any intimation that your landlord desired you to move?

A. No. Just the opposite.

145 Q. Now, at these premises, as I understood you, you carried a stock of merchandise or parts or what was it?

A. We carried a small stock at the office location consisting largely of Presto-lite gas connections, small ones, and a few accessories for welding work.

Q. What did you do at those premises?

A. Largely executive offices.

Q. And equipped for that?

A. And equipped for that, and also engineering design work.

Q. Was that done there?

A. That was done at the old location at 228 South West Temple.

Q. Were the premises specially fitted up for that work?

A. We had put these offices in that I mention, and also installed Fluorescent lights directly over drafting tables to facilitate that work.

Q. Now, then, on November 11, 1942, when you were ordered by this court to vacate that property, did you make an investigation of available locations to which you could remove?

A. Yes, we made a thorough investigation and had at least two real estate companies investigate possibilities.

Q. Who were they?

A. One was the Hogle Investment Company and we talked to the manager of the Dooly Block, the Dooly estate, and the other real estate man, I have forgotten his name, came around and offered his services. I have forgotten who did do that, but he was looking up different places, and brought several to our attention that were not satisfactory.

Q. Did you or the other officials of the Galligher
146 Company make personal surveys of the situation to find another location?

A. Yes, we looked at places within the locality from the Union Pacific depot south and from State and Main street down as far as Seventeenth South.

Q. Was there any advantage to your company in the location where you were in the Terminal Building?

A. We thought there was. Aside from the fact we had been there a great many years, we were in the same locality as other companies of a like nature, and that area was recognized as the mining and industrial equipment and supply center of this city.

Q. Are you in that territory now?

A. No, we are not. The area we are in now is generally recognized as Automobile Row, I think.

Q. Have you any competitors in the city?

A. Oh, yes.

Q. Are they located near your old location?

A. Most of them are located around the old location.

Q. Are they still there?

A. They are still there.

Q. And you are out?

A. Yes.

Q. You finally located, as I remember, at the corner of Motor Avenue and Second East?

A. Yes.

147 Q. Did you find any other suitable location in your search?

A. No, we didn't find anything that would meet our requirements at all outside of this location.

Q. Were your quarters where you were in the Terminal Building adequate for your needs?

A. Yes, they were satisfactory.

Q. Are your present quarters any more adequate than your former ones were?

A. No.

Q. Do you have any more at the new location than you did at the old, so far as your necessities and requirements are concerned?

A. None whatever.

Q. In order to occupy the new premises did you have to enter into a lease?

A. Yes, we had to sign a lease.

Q. Have you that with you?

A. Yes, sir.

Q. You hand me a lease dated January 2, 1943, between Zion's Securities Corporation and your company, leasing the property at 178 Motor Avenue from the 2nd day of January, 1943, to the 1st day of January, 1944, at a rental of two hundred dollars a month.

Is that the lease under which you now occupy your present premises?

A. Yes, sir.

Q. And are those the most favorable terms you could secure for that?

A. They were, yes.

148 Q. That is a one-year lease. I was looking through it to see if there was any option for renewal. Is there?

A. We will have the first refusal.

Q. And are there any terms, or just such terms as you agree on?

A. Just such terms as we agree on.

Q. At your old location, what did your one hundred and fifty dollars a month include?

A. The one hundred and fifty dollars rental we paid there included heat, hot and cold water, and watchman's services.

Q. What do you get for your two hundred dollars a month.

A. In the new location we get the occupancy of the building.

Q. What about the heat?

A. That is extra.

Q. Have you paid any heat bills?

A. Yes, we have paid some of the heat bills since we have been there, and they have been averaging \$58.87 per month.

(Exhibit 6 was thereupon marked by the reporter for identification.)

Q. Have you a copy of what the reporter has marked Exhibit 6?

A. Yes, I have.

Q. Entitled "Adjusted Cost Sheet, the Galligher Company Removal from 228 South West Temple to 48 South Second East Street, Under Court Order."

I will ask you if the address you have at 48 South Second East Street is the same as mentioned on your list as 178 Motor Avenue? Are those the same premises?

149 A. As a matter of fact, I think I am in error on that. 48 South Second East is the same as 178, yes.

Q. That is what you mean—it is the same property?

A. Yes.

Q. This Exhibit 6, Mr. Booth, recites—it is an exhibit composed of two sheets—down towards the bottom—

"To increase in rental cost of new location, \$200 per month over old—\$150.00 per month, 1 year at \$50.00 per month"—

Total rent of \$600.00.

Is that what you are required to pay in actual rent over and above what you were paying at the old location?

A. Yes, sir, without heat.

Q. Then the next, the last item on that first page:

"To increase of heating cost"—as per bills attached. \$58.87, which you have multiplied by 7, making a total of \$412.09.

That is your estimate of your increased heating cost?

A. That is correct.

Q. You didn't have to pay that in the old location?

A. No, sir.

Q. Did your old rent cover water and watchman's service?

A. Our old rent included hot and cold water and watchman's service.

Q. What about your new rent—does that include that?

A. No, we pay that.

Q. Have you made any charge?

A. We have paid the first water bill, \$4.25 a quarter.

Q. Do you have a watchman?

A. We have watchman's service. That costs us only five dollars a month.

Q. I notice on the second page the two last items are watchman service, sixty dollars, and water service, seventeen dollars.

Are those actual expenses which you have to pay now that you did not have to pay in the old building?

A. Yes, sir. That is per year.

Q. I am just taking it for the one year of your lease.

Now, those items you have included in the total of these expenditures, what you have not segregated out, you have included them in the total of \$4,611.24 of actual expenditures?

A. That is correct.

Q. Now, these items on Exhibit 6, some of them are explained, are they, by the legend opposite them?

A. Yes, voucher number.

Q. For instance, the "cost of removal of cooling system and drayage—as per Cline Equipment Co. bill attached. \$32.00"—

A. Yes, sir.

Q. Taking that as an illustration, it says "Voucher No. 1."

A. Yes, sir.

Q. That is your voucher, is it?

A. That is the Cline Company invoice.

Q. Did the Galligher Company pay that?

A. Yes, sir.

151 Q. Have you present in court the vouchers for all of these items where a voucher number is indicated on the exhibit?

A. I have the invoices.

Q. I say, where voucher number is indicated?

A. Yes, sir.

Q. You have the invoices?

A. Yes.

Q. They are available for Mr. Clay's inspection if he wishes?

A. Yes, sir.

Q. Have those items been paid by the Galligher Company? Just check through that.

A. Yes, they have been paid.

Q. With the exception of the yearly items such as rent and heat and watchman and water?

A. Yes, sir.

Q. I notice you have here as the second item of Exhibit 6: "Estimated cost of re-installation of same at new location"—

That is the cooling system, I take it?

A. Yes, sir.

Q. Where did you get that estimate from?

A. That estimate was made from a first-hand knowledge of what it cost to install it at the old location, and our engineers with that information available have closely estimated what it would cost to re-install at the new location.

Q. And you have that item down as \$515?

A. Yes, sir.

152 Q. And will that be necessary in order to bring your premises at the new location to the equivalent of your old location?

A. We believe it is going to be more necessary than the old place.

Q. You believe the cooling system will be more necessary in the new than it was in the old?

A. Yes.

Q. And why?

A. Because there is more window area, closed window area on the west side—on the east side of the building.

Q. Drayage and hauling, \$65.00, and \$60.00, you have there.

Were those expenses actually incurred?

A. There is one bill there—one item, \$65, that was the Redman Van & Storage Company. That was the charge for six and a half hours of the hauling company for moving our office furniture and so forth.

And the other bill, or sixty dollars, was that we charged on the use of our own truck and two men.

Q. At the Redman rates?

A. At the Redman rates.

Q. These materials for floor moldings and the removal of your sign and re-wiring and notification to the trade of your change of address, change in your advertising cuts in the national and international journals, were those all expenses necessarily incurred, and paid by the Galligher Company as a result of being required to move in these proceedings?

A. Yes, all of the expenses shown on that sheet that you have mentioned were necessitated by the court order
153 that we had to move.

Q. And were they paid?

A. They have all been paid except those that remain to be paid on a monthly basis throughout the year.

Q. I notice you have one item on page 2, \$774.50, for Nu-Art Lighting Company and General Electric Supply Company, per bills attached. You stated at the old location you had fluorescent floor lamps. Were you able to install that same kind of lighting system in the new location?

A. No, it was impossible to do that in the new location because the new location has no basement; the floor is concrete, laid on the ground, and without provision for conduits. So we had the place looked at by a number of lighting fixture companies and electrical companies and the only solution was to put in an overhead lighting system; the one that was there was inadequate, and we put in the best thing that we could to take care of the requirements.

Q. Is that any better than what you had at the old location as far as your lighting of your place?

A. It is not any better, as far as efficiency is concerned, and probably not quite as good; because with the old system,

each person could adjust their own light to suit their own requirements; and in the new place we had to make the lighting satisfy the work of all.

Q. Were those items necessarily incurred in order to carry on your business at the new location?

A. Yes, it was all required.

154 Q. This change in advertising cuts, I notice you have sixty dollars estimated. How did you reach that estimate?

A. We have somewhere in the neighborhood of twenty electrotype copper plates with our address engraved on them. It is necessary to change the whole of the plate. Those plates cost various sums from ten dollars to thirty dollars. We figure by saying sixty dollars we are probably saying about half what it actually cost us.

Q. There is another item there of eighteen hundred dollars "salary and wages of company personnel for one week only per schedule attached."

You have a staff of forty-four persons, I think you said?

A. We have a total staff of forty-four.

Q. Did you use any part of your staff for any period of time exclusively in your moving operations?

A. We figured twenty-seven of them devoted all of their time for at least a week to the move.

Q. Nothing but moving?

A. That is correct.

Q. Did you pay their salaries for that period?

A. Yes.

Q. And does this eighteen hundred dollars represent the salaries paid to the employees for the week when they did nothing but moving?

A. Yes.

155 Q. So that is the salary expense. Who are these employees—are they executives, or just employees?

A. In those employees there are listed three executives.

Q. Who are they?

A. M. H. Curry—

Q. Who is he?

A. He is vice-president. Frank E. Peterson, secretary-treasurer, and myself.

Q. And you have charged your time for a week at your regular salary, or how did you arrive at it?

A. We took one-fourth of the monthly payroll of the twenty-seven people.

Q. Was it necessary for you and Mr. Curry and Mr. Peterson to participate personally in moving?

A. Yes, it was.

Q. And was it necessary for the other members of your staff, twenty-four of them, to participate personally in the moving?

A. Yes, in order to carry on business as quickly as possible it was necessary that each person take care of their own particular records and arrange for having charge of their own particular part in this moving, so when we got in the new location there wouldn't be any confusion—each person knowing where their things and records were, so they could go to work.

Q. Did that actually save time?

A. It saved a great deal of time. For instance, you notice it only took us six and a half hours to move—that is, took the Redman Van & Storage Company six and a half hours to move our heavy equipment to the new location.

156 Q. That was partly due, I think, to the way it was organized, and the fact that we had the new location so arranged that every piece of furniture was put in its correct position immediately it got there, and all employees were there to see that their particular furniture was put where it was supposed to go.

Q. Now, Mr. Booth, are there any other items that should be added to the \$4611.24 in order to cover the expenses of the Galligher Company required by this moving?

A. There are probably a few things we could put in there.

Q. No—I am calling your attention—I am not trying to throw anything in. I am calling your attention to items which you called to my attention. For instances, signs, two hundred dollars?

A. Yes.

Q. Tell us about that. Was there any new sign required?

A. We had signs painted on the windows of the new location. They cost us a total of \$540.

Q. You didn't put that figure down, because they were better than you had at the old place?

A. Yes; we have figured out if we had the old signs, comparable, probably could have put that in for two hundred dollars.

Q. So that is what should be added, two hundred dollars?

A. Two hundred dollars.

Q. Not five hundred and forty dollars. Is that right?

A. Yes.

Q. So two hundred dollars should be added. What about these counters?

A. We figured we actually spent two hundred and 157 thirty-two dollars on counters in the new location, but had we been able to utilize the old counters from the old location we probably could have done it for fifty dollars.

Q. So you only want to add fifty dollars for counters to this account?

A. Yes, sir.

Q. So if you add two hundred and fifty dollars—I have another figure here, (47.99—where did I get that? On the sheet, Exhibit 6, the heat should be estimated at \$500 instead of \$412, is that right?

A. Yes, sir.

Q. So that makes the total \$4,699.15, plus \$250, making a total of actual out-of-pocket expenses of \$4,949.15?

A. Yes, sir.

Mr. Jones: So that we will have to put those items, your Honor, on Exhibit 6, to make it correspond to the testimony.

Q. So with that figure, \$4,949.15, we will have the total out-of-pocket expenses made necessary to the Galligher Company by this moving?

A. That is correct.

Q. Does that give you anything more than you had, as far as your purposes are concerned, or any less?

A. No, it doesn't give us any more—doesn't help us to carry on our business any better.

Q. And is it as satisfactory to you as your old 158 location?

A. As far as the actual working conditions are concerned, yes; one of the disadvantages is, we are six blocks farther away from our metallurgical laboratory, our

rubber department and our warehouse than we were before. And with gas rationing, that is an item.

Q. Were Mr. Wiggs and Mr. Baird customers of yours?

A. Yes, sir.

Q. Was it any advantage to be located near them?

A. It was very helpful, and aided us in a lot of our sales by being able to make quick contact.

Mr. Jones: Now I am going to ask him a general question, so get your objection in before he answers.

Don't answer until Mr. Clay objects if he wants to.

Q. Had you been offered five thousand dollars—that is approximately what the sum is—on November 11th, to move from where you were to where you are, would you have done it?

Mr. Clay: Object to it, if your Honor please, as speculative and argumentative, immaterial, irrelevant and incompetent.

The Court: Well, I have doubt about it in that form. He didn't want to move. But was his place—by reason of being there and having everything as he wanted it, was it worth five thousand dollars, or ten thousand dollars, or any other sum?

Mr. Jones: I will ask it in your Honor's language. I will adopt it.

159 By Mr. Jones: Q. Was it worth five thousand dollars or more than that to stay where you were?

Mr. Clay: I object to that as immaterial, if your Honor please, irrelevant and incompetent.

The Court: Did it have that value as a location?

Mr. Jones: Yes, with that understanding.

A. If we had been offered ten thousand dollars we might have thought about it.

Mr. Clay: I move it be stricken, if your Honor please.

The Court: Put it the other way, and say it was worth ten thousand dollars.

Mr. Jones: I don't want to quibble. I want to see how he felt about his location. Let it stand as it is.

I think you may cross-examine.

Cross Examination.

By Mr. Clay: Q. Mr. Booth, this lease you entered into with Zion's Security Corporation runs for a period of one year, expiring January 1, 1944; is that right?

A. Yes, sir.

Q. And then it has a clause, paragraph 10, reading:

"The lessee shall have the first refusal to renew this lease provided the deal is consummated sixty days prior to the expiration date."

That is right?

A. Correct.

160 Q. In so far as the renewal features of the lease are concerned, that is the only clause relating to any renewal feature, isn't it, in the entire lease?

A. I don't remember, but possibly it is.

Q. Would you like to look it through? I have read it through, and that is the only one I find about renewal.

Mr. Clay: In the interest of time may it be stipulated that is the only clause in the lease referring to renewal?

Mr. Jones: That is all I know of, Mr. Clay.

Mr. Clay: So stipulated?

Mr. Jones: Yes; that's all I know of.

Mr. Clay: Let's get it settled.

Mr. Jones: I haven't read it.

I am not claiming anything longer than a year, Mr. Clay.

Mr. Clay: You offered testimony concerning—

Mr. Jones: I am not claiming anything for any renewal privilege because I don't think it is worth anything the way it is stated.

Q. Mr. Booth, you spoke of having to enter into this lease, that you were compelled to enter into it, were you, in order to get these premises?

A. Yes, they required it.

Q. You don't regard the lease as a liability, do you?

A. It could be.

Q. Don't you regard a lease as more of an asset
161 to the Galligher Company than a liability?

A. It depends on the circumstances under which you get the lease.

Q. As long as you have a lease your landlord can not evict you, can he, during the term of the lease?

A. He can by U. S. Court order, or Army evict those that had leases.

Q. Isn't that more or less a guess on your part?

A. All around here they are evicted.

Q. Don't you think you would have been better off if you had had a lease in the Terminal Building than you were without a lease? Don't you think your lease would have been an asset to you over there?

A. I don't know whether it would have been or not; apparently it wasn't necessary; we were under the impression, gained by years of occupancy, that a lease wasn't required. And the new owner, Mr. Richards, came around as soon as he had the building and assured us he would be very glad to have us continue on as tenants, and hoped we were satisfied, and promised us a number of improvements.

Q. You have seen in this case, haven't you, Mr. Booth, that the Carruthers Company sold a lease for the sum of five hundred dollars to the Wiggs people? Wouldn't you consider a lease an asset?

A. It depends on how the lease is obtained.

Q. Your lease, over in the Terminal Building, wouldn't it have been an asset to you rather than a liability?

162 Mr. Jones: Now?

Mr. Clay: That is right.

A. I don't know as it would be.

Q. How much rent did you say you were paying in the Terminal Building?

A. \$150.

Q. A month. And pay two hundred dollars in the new location?

A. Yes.

Q. Might have been possible the government would have taken over your lease if you had had one, Mr. Booth?

A. I don't know about that. They didn't take over the Chicago Pneumatic Tool lease.

Q. You don't know whether they did or not, do you?

A. I know he is in court.

Q. He may be in court on another ground.

You are vice-president of the Galligher Company, and you have been connected with them how long, did you say?

A. For eight years.

Q. It is a big company, doing a million dollars' worth of business a year in this locality, is that right?

A. Internationally, not in this locality.

Q. A million dollars a year altogether.

You have other offices outside of Salt Lake City?

A. No, sir.

Q. As a business man don't you think it is good business for a corporation such as the Galligher Company to have a lease upon the premises it is occupying?

Mr. Jones: I object to any farther of this on the 163 ground it is argumentative.

The Court: Yes, it wouldn't make a bit of difference what he thought about it. It is more important what the court thinks about it, and the jury.

Mr. Clay: That is true. What precipitated this was that on the direct examination he gave answers from which I concluded he considered a lease was a burden rather than having any advantage.

Q. Do you consider the lease you entered into with the Zion's Security Corporation as a burden to the Galligher Company?

A. It suited the requirements for the immediate future.

Q. In so far as the next year is concerned, you know they will be unable to increase your rent, don't you?

A. For this particular year, yes, sir.

Q. And you know in so far as they are concerned they will be unable to evict you?

A. Except as the provisions of the lease.

Q. For breach of the lease. Was a clause in there giving you the right, the first refusal to continue the tenancy or not, at your request?

A. We asked for a renewal clause and we got what they offered.

Q. You asked for a renewal clause, and what they gave you was in section 10?

A. Yes, sir.

Q. You have spoken of some lights over there that you installed. You have how many employees altogether?

164 A. In the office we have—

Q. Including your drafting room.

A. We have thirty in the office.

Q. And you are required to use artificial lights in your new location?

A. Oh, yes.

Q. And you were required to use artificial light in your old location?

A. Yes.

Q. All these items—I will ask you about just a few of them—for instance the first item there—cost of removal of cooling system, \$32.

That relates to the expenditure in your new location entirely, does it?

A. No, sir. That was the cost of taking our cooling system out of the old location and putting it in storage.

Q. Included the removal and the installation?

A. It wasn't installed. It was put in storage.

Q. And it is still in storage, I suppose?

A. Yes, sir.

Q. You have got estimated cost of reinstallation of same at new location, \$515. That is for that cooling system?

A. That is for putting the cooling system in the new location and the housing required to put it in.

Q. That is estimated cost to you by J. L. Peterson?

A. J. L. Peterson is one of our engineers.

Q. Does the Cline Company do your installations?

165 A. Yes, sir.

Q. Didn't get an estimate from them?

A. The estimate was made with their cooperation on previous experience as to what it cost installed in the old location.

Q. Drayage and hauling of office furniture, equipment, stationery and so forth, \$65.

That is correct? Do you have a copy of the Exhibit 6?

A. Yes. That is Redman Van & Storage charge.

Q. You have got hauling and so forth as above, Galigher truck and two men, twelve hours at five dollars per hour. Does that mean five dollars per hour per man?

A. That means five dollars for the two men. Sixty dollars total for the truck and the two men.

Q. That is your own truck and your own two men employed by you?

A. Yes.

Q. What do they do ordinarily?

A. Haul equipment and supplies.

Q. That is their regular work?

A. Yes.

Q. They are not office men?

A. No, they are truck men.

Q. And then did you pay the telephone company for installing your private exchange board?

A. Yes, that is their actual cost.

Q. This item on the second page, rewiring and installation of lighting fixtures per General Electric Supply Company and Nu-Art Lighting Company, bills attached, totaling \$774.50, has that been paid, or is it an estimated amount?

A. I have the invoices here, and they have been paid.

Q. Notification to trade of change of address, postage and so forth, per Gottschall Printing Company, \$88.65—did you pay the Gottschall Printing Company that amount?

A. Paid them \$88.65, yes.

Q. Doesn't that include some postage? Do they furnish the postage, or do you?

A. We didn't charge the postage.

Q. You have "notification to trade," "postage, etc."

Doesn't that include postage?

A. It must have, if it says so.

Q. Does the Grocer Printing Company do that kind of printing?

A. Yes, they do. But they weren't able to take care of this job, because they had been evicted.

Q. Did you say that the Grocer Printing Company is a customer of yours?

A. The Grocer Printing Company?

Q. That you were a customer of theirs, rather?

A. Yes, sir.

Q. Outside of this particular job, have they lost any other printing job by reason of their removal by one block?

A. I couldn't answer that.

Q. As far as you are concerned?

A. I don't know, because I didn't take care of the printing.

Q. Do you think you will not patronize them any more because they are a block farther north than they were before?

A. No, that wouldn't make any difference to us.

Q. And if they had been able to do this particular job, the Grocer Printing Company would have gotten it instead of Gottschall, is that right?

A. At least they would have had an opportunity. I don't know.

Q. Had an opportunity to figure on it?

A. Yes.

Q. What is this "changing advertising cuts to National and International trade journals"—"\$60.00 estimated"?

Will you tell us about that, please?

A. In our international advertising we use copper plates on which we have our company's name printed and our address printed on the plates with an insignia representative of the Galigher Company. That is purely an estimate, but I do know we have in the neighborhood of twenty cuts in various trade journals.

Q. Think it would run about three dollars a cut?

A. They run from ten dollars to thirty dollars a cut.

Q. Will you have to change those cuts entirely, destroy them and get new cuts?

A. We have already done it. Yes.

Q. I don't get the sixty dollars. That is only about six cuts?

A. We probably could have doubled that and still be within the cost. It is a little bit difficult to figure just what it would be, because we haven't changed all of our

cuts. We have only changed those we thought were
168 absolutely necessary. Whether we change more or
not will depend upon a lot of things.

Q. These last items—counters, fifty dollars, Salt Lake Cabinet. I didn't hear all of your testimony on that. What does that represent?

A. We have a counter that is used for customers that come in and want to lay something on a counter. Have to have a counter for them.

Q. Ordinary counter?

A. Yes. We had one over at the old location, and in taking it out it was damaged to such an extent that it couldn't have been used, and another thing, it was larger than the place we have available for it in the new location, so we put in a new counter. The cost was \$232. But we figured if we had been able to utilize the old one possibly the cost would have only been fifty dollars. That is what we are putting in a claim for—not \$232, but \$50.

Q. I didn't get the \$46.99.

A. Then there is an item of \$540 that we actually paid for window signs in the new location. We had window signs in the old location. We required something at the new location, because we had too many customers walk by our place and still looking for us, so we had to put some signs in the window.

The cost is \$540. Had we made the signs comparable to what we had in the old location the cost would have been closer to two hundred dollars, which is the cost we are putting in, not \$540. \$200.

Q. So that on your increase of heating cost for
169 seven months heating you have stepped it up from
\$412.09 to \$500?

A. Yes, sir.

Q. That is your estimated cost of the heating in your new location?

A. I think it will be at least that, because the last few months this winter have been very mild.

Q. That is the estimated cost in the new location?

A. Yes.

Q. This watchman service, five dollars a month. Have you a watchman employed over there?

A. We were able to obtain the services of a watchman in that area that serves other buildings, consequently we were able to get it at that.

Q. You had watchman service over in the old location which service was furnished by the Dooly Building?

A. Probably was furnished from the Dooly Building through some arrangement they had with the owners of the building.

Q. I think you testified about some repairs you made in the old building, Mr. Booth?

A. Yes, sir.

Q. How long ago was that?

A. It was at two different times. The first time, about two years ago, and the second time about a year later.

Q. And the alterations you did two years ago, was that where you made a separate room for the drafting?

A. Yes, for the drafting department and private office.

Q. That is about two years ago?

170 A. Two years ago for part of it.

Q. Are you making any charge for that?

A. No, that is not here at all.

Q. That is not in there at all?

A. No.

Mr. Clay: That is all.

Redirect Examination.

(By Mr. Jones):

Q. Is there anything on Exhibit 6 that was not required by the move?

A. No, there is not anything in there.

Q. By the way, for the record, Mr. Booth, your lease in the new place is January 1st. Were you in the new place in December of 1942?

A. In the new place?

Q. Yes.

A. Yes.

Q. Did you pay rent for that month?

A. Yes, sir.

Mr. Clay: Is that an item in your expenses?

Mr. Jones: I am going to find out.

Q. Did you pay that to the Zion's Securities Corporation?

A. Yes, sir.

Q. How much?

A. I was just looking for it. We paid two hundred dollars.

Q. You haven't put that in your itemization of Exhibit 6—or have you? It is not on there, is it? That
171 is for the year of the lease, and you were in there a month before the lease became operative?

A. No, I haven't put that in.

Mr. Jones: I think that is all.

(Exhibit No. 6 is in words and figures as follows:)

"Ex 6

"Adjusted Cost Sheet

"The Galigher Co. Removal
from 228 So. W. Temple to 48 So. 2nd East St.
Under Court Order

	Amount	Voucher No.
"To cost of removal of cooling system and drayage—as per Cline Equipment Co. bill attached	\$ 32.00	1
"Estimated cost of re-installation of same at new location—per estimate of J. L. Peterson—attached	515.00	2
"To drayage and hauling of office furniture, equipment, stationery, records, supplies, etc.—per Redman Van & Storage Co. bill attached	65.00	3
"To hauling etc. as above, Galigher Truck and 2 men—12 hrs. @ \$5.00.....	60.00 estimated	
"To removal of P.B.X. Board and telephones and reinstall at new location—per Telephone Co. bill attached.....	60.71	4
"Materials—floor mouldings, fittings, etc. for above.....	3.49	4
per General Electric Supply Co.	5.72	6
bills attached	13.22	7
	3.84 26.27	8

	Amount	Voucher No.
"To removal of sign and re-hanging at new location per Geo. J. Maack Co. bills attached	39.00 1.02 40.02	10
"To increase in rental cost of new location, \$200 per month over old—\$150.00 per month, 1 year at \$50.00 per month	600.00	11
"To increase of heating cost against none at old location, average per month per bills attached for 7 months heating per year	7 500.00	12 to 14

"Forward— \$1899.00

"Adjusted Cost Sheet

"Page 2

"Forward— \$1899.00

"To rewiring and installation of lighting fixtures per	32.59	15
General Electric Supply Co.	3.10	16
and Nu-Art Lighting Co. bills attached	633.81 105.00 774.50	17 18
173 "To notification to trade of change of address, postage, etc. per Gottschall Printing Co. bill attached	88.65	19
"To changing advertising cuts to National and Inter-National trade journals. est.	60.00	estimated
"To salary & wages of company personnel for 1 week only per schedule attached	est. 1800.00	20
"To Watchman Service @ \$5.00 per month	60.00	actual
"To Water Service @ \$4.25 per quarter	17.00	Based on 1st quarter

"Total \$4699.15

"New counters \$230.00, charged against moving	50.00
"New signs \$520.00, charged against moving	200.00

\$4949.15"

(At this point the further hearing of said cause was adjourned to Wednesday, March 31, 1943, at ten o'clock a. m.)

Salt Lake City, Utah, Wednesday, March 31, 1943:
10:00 A. M.

174 (Pursuant to adjournment, the further hearing of said cause was resumed, and the following proceedings were had.)

Mr. Jones: May the record show, your Honor, that I have added page 3 to Exhibit 2. That is the Grimsdell-Grocer Printing Company—to reflect the items that were testified to as to an estimate for the new blower, the estimate for the urinal and the washstand, installed, the electrical work done in the two rooms, and employees used exclusively in moving, the increased cost of heat for the term of the new lease, the increased cost of rent, showing the complete total of out-of-pocket expenditures of that exhibit, of \$9,741.34 for the Grocer Printing Company,—\$9,741.34.

I furnished Mr. Clay with a copy of the third page, so may Exhibit 2 now be considered consisting of three pages instead of two?

Then on the other exhibits, 4 and 6, the girl didn't have time to put on those other totals.

The Court: Call your witness.

175 F. ORIN WOODBURY was thereupon called as a witness by and on behalf of the defendants, and having been first duly sworn herein, testified as follows:

Direct Examination

(By Mr. Jones:)

Q. Will you state your name, please?

A. F. Orin Woodbury.

Q. And your residence?

A. Salt Lake.

Q. How long have you resided in Salt Lake?

A. All my life.

Q. Are you in business in Salt Lake?

A. Yes, sir.

Q. What is your business?

A. Real estate agent.

Q. Just explain a little more in detail what you mean by that.

A. Brokerage, property management, appraising, insurance.

Q. How long have you been engaged in that business, Mr. Woodbury?

A. Twenty-four years.

Q. Are you connected with any business concern?

A. With the Woodbury Corporation.

Q. How long have you been connected with that?

A. Since its organization.

Q. What position do you hold?

A. I am general manager.

176 Q. You say since its organization. How long is that?

A. Under that name, April, 1935.

Q. In your business, Mr. Woodbury, have you had experience in renting from others and to others business property?

A. I have, yes.

Q. In Salt Lake City?

A. Yes, sir.

Q. Do you hold any particular, what in the legal profession we call degrees?

A. I am a member of the Institute of Real Estate Management of the United States, a national association of real estate boards.

Q. Does that give you any particular title?

A. Yes, I am qualified as a certified property manager. That is the highest title they give.

Q. What does that mean?

A. It means that you qualify as to ability and as to integrity, subscribe to the code of ethics adopted by them and maintain a current contact with them through progressively changing theories of management.

Q. Is that a national organization, you say?

A. Yes.

Q. Composed of realtors throughout the United States?

A. Yes, sir.

Q. Are there other C. P. M.'s in Salt Lake or Utah?

A. There is one other in Utah.

Q. You two are the only ones in the state?

177 A. As far as I know. I haven't heard of any others.

Q. Mr. Woodbury, have you ever been employed by the United States of America to appraise business property for rental purposes and to assist the government in acquiring property for office space?

A. Yes.

Q. What was that employment?

A. That was in connection with the office of decentralized service, part of the Public Buildings Administration.

Q. How many of you were engaged in that work in the United States?

A. There were seven directing it; I really don't know the number on the staff.

Q. I mean directing the work. Were you one of the seven?

A. I was.

Q. What did that work consist of?

A. Well, I went in first as consultant and then changed to assistant manager of the service.

Q. Where was your service?

A. Some work out of Washington, but principally from St. Louis to the east coast,—New York.

Q. What did you do in that work?

A. Well, my work consisted of locating, analyzing communities first, or taking the analyses presented by the people in those communities of the housing facilities, that is, both residential and commercial housing, and then adapting some bureau of government that was on the approved
178 list for transfer from Washington to those situations.

Q. In that connection with you assist in the removal of any of the government departments from Washington and their relocation in other communities?

A. Yes, sir.

Q. Which were they?

A. The first one we moved was the Patent Office, to Richmond.

Q. Virginia?

A. Yes.

And moved the Securities and Exchange Commission to Philadelphia. Moved the Wages and Hours Division of the

Labor Board to New York. Moved the Railroad Retirement Board to Chicago, the Department of Indian Affairs,—there was quite a list of them.

Q. Indian Affairs to where?

A. Moved the Department of Indian Affairs to Chicago.

Q. In that work did you have to acquire locations in business districts, arrange with tenants to move so as to accommodate the departments of the government?

A. Well, we had some of that. There were generally enough vacant spaces. We tried to fill in where vacancies were. We didn't pick a site where there were too many tenants in a building.

Q. Did you have any experience with the work of moving tenants?

A. Yes, we vacated some property.

Q. And appraising their tenancies?

A. No, I can't say that we appraised their ten-
179 ancy in that connection.

Q. Did you move tenants and compensate them for their moving?

Mr. Clay: I object to it as immaterial, if your Honor please.

The Court: It is, except as showing his qualifications.

Mr. Jones: That is all I want.

A. We didn't do the actual compensating in those cases.

Q. Did you lay the groundwork?

A. We prepared the material for the benefit of the government where that was handled—the unit of government.

Q. That is not exactly what I wanted to know. Was it part of your duty to furnish the figures of estimates on the moving and getting the tenants out of their property, and what should be done with the tenants and what should be paid them, and so on.

A. No, it was not, because in any case where we handled that we worked out a deal, in each case I handled personally—I don't know what some of the others might have done—in those I handled personally, and reviewed, we had the landlord work out a deal with his tenants before we would agree to take the building. We waited until that was done, and they did work out their arrangement, or we didn't ap-

prove the thing. Because some other building wasn't overcrowded.

Q. So that in your work you came in contact with the business of removing tenants to make way for governmental departments?

A. That is right.

180 Q. And you did have tenants removed to make way for the governmental departments as you have indicated?

A. In that indirect way, yes.

Q. Coming back to Salt Lake City, I think you said in your work you have rented business property to tenants and rented it from landlords?

A. That is right.

Q. And where within the business district has your experience led you in that work?

A. Throughout the business district in general.

Q. Have you had any experience with property on West Temple?

A. Yes.

Q. Tell us in a general way.

A. That is the more isolated section I handled as a member of the Real Estate Board appraisal department on business properties in the commercial district.

Q. You say you have been a member of the Real Estate Board?

A. At the time the Real Estate Board committees were appointed to assist in re-assessing or suggesting values for the benefit of the assessor of the county, I worked on the committee handling the business district properties.

Q. When was that?

A. I believe it was 1936, but I am not positive. I might be out a year or two. Mr. Gaddis would know, and Mr. Kiepe would know.

Q. You were on the Real Estate Board. Is that an organization of real estate men in the city?

A. Yes.

181 Q. Have you ever been an officer of that?

A. Yes.

Q. What?

A. I have been on most of the committees, and been vice-president of the Board.

Q. Go ahead with your description of these business properties generally that you have had experience with, and where they are.

A. It is difficult to operate in the real estate business without having experience in connection with most of the localities within the city in business properties. As a management project, we haven't managed properties on West Temple.

Q. Where have you managed properties?

A. I think on about every other street in the city. We had one property on West Temple; we managed that.

Q. Generally what properties have you managed?

A. I have managed the Templeton Building, the Westinghouse Electric Supply Building, Denver Fire Clay Building, the Clayton Investment properties, those properties running on First South from Regent to State Street, on State from First South to and including the theatre. The property on Regent Street we tore down for a parking lot.

Properties on Orpheum Avenue, on West First South from the corner where Porter-Walton is, the west half, through the block. Properties next across the street from Bennetts, the Auditorium Garage, the motor place where Norvell used to be, the Studebaker agency, on Main between Fourth and Fifth South. Hayes is the tenant.

Some over on State Street. Eighth South on State, between Eighth and Ninth and Seventh and Eighth.

Q. On November 11, 1942, were you familiar with the general availability in the business district of Salt Lake City of business property for office space on the ground floor?

A. Yes.

Q. What was the situation with regard to such availability?

A. There was a definite shortage of good available business space in units above two thousand feet—above eighteen hundred feet, square feet.

Q. Can you be a little more specific than to say there was a definite shortage? Were you familiar with the Terminal Building on West Temple street?

A. Yes, sir.

Q. How long have you been familiar with that building?

A. I made an appraisal of the building back—I don't have the date of that; I can't remember the year. But it was some years ago.

Q. Approximately?

A. It was, I think, during 1935.

Q. In that work did you go through the building?

A. I did.

Q. Did you inspect the premises occupied by Mr. Grimsdell, the Grocer Printing Company?

A. Yes. I went through the entire building at the time.

Q. The space occupied by Galigher?

183 A. Yes.

Q. By Mr. Wiggs—the Chicago Flexible Shaft Company?

A. I can't recall all of the tenants. I know those three were there.

Q. You recall those three?

A. Yes.

Q. Calling your attention to Exhibit 1, and the space on there marked "Independent Pneumatic Tool Company." That is just south of Mr. Grimsdell.

Did you go into the building and the space occupied by them?

A. I went in each one of the spaces at the time.

Q. You say you recall definitely the properties occupied by Mr. Grimsdell and Mr. Wiggs and the Galigher Company?

A. I recall all of the properties, I think, in some general degree. But I remembered those were the tenants.

Q. Were you familiar either by that examination or by any that you have made independently of that since, in a general way with the nature and characteristics of the property occupied by them?

A. Yes, sir.

Q. The Independent Pneumatic Tool Company now?

A. Yes, sir.

Q. Have you examined any maps to determine the dimensions of those properties?

A. Yes, sir.

Q. What maps were they?

184 A. I examined a map in the district attorney's office the other day that was purported to have been prepared by the United States Engineer's group.

Q. I call your attention, Mr. Woodbury, to the map attached to the files in this case, marked in red pencil "Sheet 1," and ask you if that is the map that you examined in connection with your testimony in this case?

A. It looks like it.

Q. Well, look at it again.

A. I think I can safely say so.

Mr. Clay: I wasn't there, but if he says that is the map—

The Court: You are not disputing it?

Mr. Clay: No.

Q. Have you examined Exhibit 1?

Mr. Clay: We have no objection to removing it and passing it to the jury.

Mr. Jones: I don't see any need of having two maps.

Q. You have examined Exhibit 1?

A. Is this Exhibit 1?

Mr. Jones: That is on the board.

A. Only from this distance at this time.

Q. Well, look at it. Let me ask one or two preliminary questions.

Did you take the dimensions, the measurements from this map that is attached to the complaint?

185 A. There were no measurements on that map. I scaled it with a ruler.

Q. It has a scale on it?

A. A one-eighth scale.

Q. Did you take measurements by means of that scaling?

A. Yes.

Q. I wish you would compare the measurements you made with the measurements on Exhibit 1.

A. They are slightly different. Shall I state the difference?

Q. Yes.

A. They have a width of 51-6. I scaled it 52 feet for the Galigher frontage. They have a depth of 94, which is exactly the same as mine.

The Court: Inside or outside measurements?

The Witness: I was taking inside measurements from the scale as near as I could. However, the wall thickness was not shown. If it was a matter of extreme accuracy—

The Court: There is testimony in this case as to the dimensions of all these buildings on the inside. Is there going to be any dispute about it?

Mr. Clay: No.

The Court: Assume that testimony is correct.

Mr. Clay: May be a difference of two or three feet; doesn't amount to anything.

By Mr. Jones:

Q. Substantially are your dimensions the same as those shown on Exhibit 1?

186/ The Court: Should not be any dispute about it.

A. I am surprised there is a difference on three hundred square feet in a building that only has half a foot difference in the smallest dimension. Just a matter of mathematics. I had 4,888 on Galigher. This map shows 4,576.

Mr. Clay: Whoever multiplied it made a mistake.

By Mr. Jones:

Q. You say you show 4,888?

A. Yes.

Mr. Jones: The testimony in this case so far is that the old tenancy is 4800 at West Temple for Galigher.

Mr. Clay: Whoever made it is wrong to that extent. The record shows it is 4888, Mr. Bachman tells me.

Mr. Jones: This Exhibit 1 is wrong on that. You may assume 4888.

Q. The Wiggs property on West Temple has been testified to as approximately 3,000 square feet.

A. This shows 2813.

Q. What do your measurements show?

A. 2955.

Q. 3,000 is accurate enough, then. That is what is in evidence.

The Independent Pneumatic Tool—

Mr. Clay: Pardon me—are we agreed upon 2813?

Mr. Jones: Yes. He says 2955. Mr. Wiggs said approximately 3,000, when he testified.

Q. The Independent Pneumatic Tool Company has
187 been testified to as 2,664—

Mr. Jones: What do yours show, Mr. Bachman?

Mr. Bachman: 25-foot frontage by 93 feet deep, 38 feet in the rear.

The Witness: It is the same depth as the other one, isn't it? The map shows it the same.

Mr. Clay: It is wider in the rear than in the front.

By Mr. Jones:

Q. According to your figures Exhibit 1 is wrong as to the square footage of the Wiggs property?

Mr. Clay: Mr. Wiggs said it was 3,000; we only claim 2,800. If you want to make it 3,000, we will do it.

Mr. Jones: I want to make it as near as I can, Mr. Clay. We passed the Wiggs. That is assumed to be around 3,000. The Independent Pneumatic Tool, 2,664.

The Witness: I show 2,555. It is a difference in depth, primarily. But that is approximately right according to these dimensions they have.

By Mr. Jones:

Q. On Exhibit 1, 2,664, we will assume is correct on that. Is that right?

A. I have 2,664; they have 2,555.

Mr. Jones: 2,664 is what is in the record. 2,664 we will assume.

Q. The Grocer Printing Company has been testified to as having in the old location approximately 5,000
188 square feet.

A. I have 5,032. They have 4,964.

Q. We were talking about the general availability of business space on November 11, 1942. You say you are familiar with the nature and character of the businesses conducted by Mr. Grimsdell, Mr. Wiggs and the Galigher Company.

Are you familiar with the nature and character of the business conducted by the Independent Pneumatic Tool Company in *ther* Terminal Building now?

A. Now, I am.

Q. With reference to those particular businesses does your testimony apply that there was a scarcity of business space for use of such businesses in Salt Lake City on that date?

A. That is correct.

Q. I think you said where the floor space was above 1,800 square feet?

A. They are all above 1,800.

Q. Assuming on that date Mr. Grimsdell was paying eighty dollars a month—had been for ten or eleven years—Mr. Baird of the Independent Pneumatic Tool Company was paying forty-five dollars a month, which would continue for three years and then to be raised to fifty dollars a month for two additional years; that Mr. Wiggs of the Chicago Flaxible Shaft Company was paying one hundred dollars a month; and the Galigher Company one hundred and fifty dollars a month as rental for those properties, and that Wiggs and Galigher had been paying the same for at least ten years past, and that included heat,
189 water and watchman's services. Now you may assume that fact.

Have you examined their present quarters?

A. Yes, sir.

Q. And where are they located now?

Mr. Clay: No dispute about that, is there?

Mr. Jones: I want to show his familiarity with it, Mr. Clay, so the jury may get the information as to the comprehensiveness of the study he has made.

A. Galigher is located on the southwest corner of Motor Avenue and Second East.

Q. Are you familiar with that property?

A. Yes, sir.

The Grocer Printing Company is on West Temple just south of the Utah Power and Light Building, the old headquarters.

The Chicago Flexible Shaft Company is on Fourth South, the north side of Fourth Street, between West Temple and Main.

Q. North side of Fourth South?

A. Correct. At about No. 50.

The Independent Pneumatic Tool Company is on the South side of Fourth South between Church Street and State, at about No. 54.

Q. Can you give us the dimensions of the present properties?

A. The Galigher space is 55 by 72, with a mezzanine 55 by 50.

The Grocer Printing Company is 65 by 62.

The Chicago Flexible Shaft Company, 44 by 100.

190 The Independent Pneumatic Tool Company, 15½ by 75.

Q. Now, what is the area—have you computed that?

A. Galigher has 3,960 on the main floor with a 2,750-foot mezzanine.

Grocer Printing has 4,030.

Chicago Flexible Shaft has 4,400.

Independent Pneumatic Tool has 1,162.

However, there is one thing I overlooked in these dimensions. The Galigher Company, there was a mezzanine in addition to 4,888 I didn't measure in the old property.

Q. There was a mezzanine in the old property?

A. Yes.

Q. I didn't know that.

A. Well, it was there.

Q. What was that—was it used?

A. Yes.

Q. Would that add to the 4,800 square feet, then, of the old property?

A. Yes.

Q. You haven't any figures on that, have you?

A. No, I haven't. I have just a rough estimate, because I never did measure it.

Q. Can you give us a rough estimate?

A. I just estimated it could have been fifteen by thirty feet, as near as I could picture that thing the way it was there. About 450 feet.

Q. Which would bring it up with that estimate to 191 5,250 at the old place?

A. I don't think that space can be compared with the ground floor space, though. That should hardly be added to the ground floor. It has not the same value at all; should be considered separately.

Q. Have you examined the present quarters of the four people in detail?

A. Quite in detail I have.

Q. Just tell us what your examination consisted of.

A. I measured them by the rough method of stepping them, which I checked against the plats to make sure my stepper was not out far; found it to be quite accurate.

I went through the property. I estimated the cubical contents for the purpose of heat consideration. I examined the type of structure in general, the bracing in the case of a business where they had heavy weight; the rights-of-way, particularly in connection with the Flexible Shaft business.

Q. You say you examined the cubic contents for the purpose of determining the heating requirements, is that right?

A. Yes.

Q. Mr. Woodbury, starting with Mr. Grimsdell, the estimate for heating that property has been introduced in evidence as approximately six hundred dollars a year. Would you say that is reasonable, or not?

192 Mr. Clay: I object to it, if your Honor please; this witness has shown no qualification as a heat expert.

Mr. Jones: He says he made that examination for that purpose.

The Court: Ask him what he knows about it.

By Mr. Jones:

Q. What do you know about heating properties, Mr. Woodbury?

A. Most properties you manage have to be heated in this country. We do have to estimate costs. We operate the heating plant, central heating plant, in the block between First to Second South, and Main and State.

Q. Do you know what the heating requirements are in business properties in this city?

A. I don't profess to be an engineer. I rely on a good one when we have a technical question.

Q. Do you know from paying the bills what the heating costs are?

A. I know when I feel they are about right and when they are not.

Mr. Jones: Go ahead and answer my question.

Mr. Clay: We make the same objection. He still doesn't show his qualification as a heating engineer.

The Court: One question you might ask, if he knows what the cost of operation would be.

By Mr. Jones:

Q. Do you know what the cost of operation is, generally speaking?

A. That will depend on the type of the plant you have.

Q. Do you know what the heating plant is for the 193 Grimsdell new location?

A. That is heated from the Utah Power and Light central plant up in the block north of South Temple.

Q. If Mr. Swaner, their engineer, had said their heating costs for the past fifteen years—

Mr. Jones: That is in evidence—I showed you the letter; you made no objection to it, Mr. Clay.

Q. If Mr. Swaner, the engineer of the Utah Power and Light Company stated the heating costs averaged for the past fifteen years six hundred dollars a year, would you say that was about right, or not?

Mr. Clay: I object to that as asking this witness to pass on the credibility of Mr. Swaner.

The Court: Leave out any reference to Mr. Swaner, and he may answer.

Q. Leave that out. Just say whether you think six hundred dollars a year for the heating of that property is right, or not?

Mr. Clay: Same objection, as to his qualifications.

The Court: Same ruling. He may answer.

Mr. Clay: Exception.

A. I hesitate to accept such a figure, in view of the fact the actual bills didn't seem at first to bear that out.

Q. What do you mean by that?

A. It happens in 1943—the winter of '42-'43 we have had a very mild winter. If you just take the bills 194 for this winter as an average, you go wrong. But I checked back with others, even with the experience of the former tenant in the north twenty feet of that building, and found the bills had run much higher, and the estimate of six hundred dollars seemed reasonable at their rates.

Q. Now for the Independent Pneumatic Tool Company—I thing they have the heat furnished with the rent in the new property.

A. That is as reported to me.

Q. So coming down to Mr. Wiggs at 46 to 50 West Fourth South, he has the remains of a lease so he may occupy the property for seventeen months. He estimates the heating of that property for the seventeen months at \$425 for the seventeen months.

A. I estimated it at \$450.

Q. So \$425 would be reasonable, in your judgment?

A. Yes; two winters.

Q. And that goes from December of one year—

A. —to May 1st, I have it—May 1st.

Q. The Galigher property on Motor Avenue—are you familiar with the heating of that property?

A. I am, yes.

Q. Have you ever operated that or managed it?

A. We never have, but I am familiar with the operation.

Q. He estimated the heating of that for one year at five hundred dollars. Is that reasonable, or not?

A. That is, yes. The heat bills I have on that, in 1942, starting out with January, was \$113.85.

February, \$93.67.

195 March, \$72.60.

That is when the government was in there, as compared with bills this year of \$62.00; \$56.00 and \$47.11.

Q. Would five hundred dollars be low, or not?

A. If you take the fiscal year from October, 1941, to September, 1942, you would have \$651.42 as the actual heat bills. So if you get five hundred dollars even, though that is more than the thing would work out based on the bills that have been paid by Galigher so far this year, it would seem to be a reasonable estimate, especially in view of the fact there has been eight per cent increase in heating charge since that time.

Q. Do you know of any space that was available on November 11, 1942, that would accommodate the Grimsdell business—the Grocer Printing Company—as well as the space they now have, that was available at that time?

A. No, I don't know of any that would have accommodated them.

Q. Assuming Mr. Grimsdell is paying a rental of one hundred and twenty-five dollars a month plus his heat bills which he pays himself, would you say that is or is not reasonable for that property?

A. I think that is reasonable.

Q. As rentals were at that time?

A. At that time.

Q. If the Independent Pneumatic Tool Company—is their present space comparable with what they had before?

196 A. No, it is much reduced—much less.

Q. Is the building comparable as where they were?

A. No, it is a different type structure.

Q. What about the Grocer Printing? Is theirs comparable with what they had?

A. Quite a different type structure.

Q. Explain to us what you mean by that, in both instances.

A. The Grocer Printing Company, the structure was originally a four-unit building of 20 and 30 and 15 foot units. They have made a hole through the partition to get from one to the other, which is very unsatisfactory, the type we would call, in management of property, or esti-

mating values of property, cut into small units by having a panel across the bottom and another at the top which reduces the cost, and so on.

The building itself is a one story structure. The floors are not long, and the joists don't have to be too heavy. The space between the ceiling and the roof is minimum. The structure generally is that of an old brick painted.

Q. Is it insulated or not?

A. I didn't get in the back. I checked with the Power Company to determine, and they said it was not.

Q. Where he was at the Terminal Building, what would be the comparison between the two places for comfort and working conditions in the hot months?

A. The other building was a two-story building; he was on the west side of the street. Now he is in a one-story building on the east side of the street, where the
197 radiation from the sun in the afternoon is much greater in summer. He is exposed on four sides to the elements. Before he was exposed on only the three sides, and then to the north there is an alley in there.

Q. In your judgment, to make the property workable in the summer months is anything required to be done?

A. I think he will have to insulate the ceiling to stand the pressure in there.

Q. What do you mean by "pressure"?

A. The heat.

Q. What would the reasonable cost of that be?

Mr. Clay: I object to that as immaterial. Isn't any evidence here by Mr. Grimsdell or any other witness that he contemplates doing that, or any estimated cost of what it might be, by him.

Mr. Jones: Mr. Grimsdell doesn't know. He has not been in there a summer. We are giving the facts. The jury can do what they want with it.

The Court: He can answer on your theory.

Mr. Clay: Exception.

A. I arrived at the figure of \$524 for insulation.

Mr. Clay: Are you going to claim that?

Mr. Jones: I am going to put it in; I think the jury is entitled to consider—

Mr. Clay: Are you going to put it in your claim in addition to what you filed?

198 Mr. Jones: No, I am not going to put it on Exhibit 3.

Mr. Clay: That is your claim, isn't it?

Mr. Jones: That is our exhibit as to what he spent.

Mr. Clay: If this is to be included, we move it be stricken.

Mr. Jones: We will add it, then, if Mr. Clay wants. I will put it down as estimated expense of insulating the roof, at \$525.

The Witness: I gave \$524.

Q. Coming to the Independent Pneumatic—

Mr. Clay: I think the court did not rule on my last objection.

The Court: The objection may be overruled.

Mr. Clay: Exception.

By Mr. Jones:

Q. Anything else required there at the new location of the Grocer Printing which in your judgment is necessary to make the premises habitable or usable in comfort that has not been done?

A. You might put awnings up there. That would help considerably. I made no estimate as to their cost, because you can't buy them at present.

Q. Did you look at the supports that are under the floor to support the heavy presses?

A. Yes.

Q. What is that installation?

199 A. It is not too elaborate, but it does the job. It is a sort of prop set-up, some supports there, vertical supports placed under the floor at certain points where the weight is concentrated. In one case they removed the floor and laid concrete on the ground, built it up so certain machines could rest on the solid concrete.

Q. Is that for the heavy press?

A. I am not familiar enough with printing machinery to say it is a press, but it is a very heavy piece of equipment.

Q. Is that for the big one?

A. Yes, it was a big one.

Q. That is the only instance where they put concrete, is for that press?

A. Yes.

Q. You say it is not elaborate. Would you say there has been any more money spent in supporting those presses and that machinery than was required?

A. No.

Q. The Independent Pneumatic Tool Company location, is their place in addition to being much smaller, is it comparable in any other respect to what they had?

A. It is a one-story building as compared with a two-story building before. You are speaking of the building itself, not anything as to location—the building itself is also as reported uninsulated in the roof and that will be noticeable, I think, in the hot weather. It is slightly narrower, which cramps—the way they have it set up isn't quite
200 as free. In checking the value there I didn't see anything else in particular.

Q. Would you say that is or is not the equivalent of what they had?

A. Oh, no, it is not.

Q. Less satisfactory from a business standpoint?

A. It is less than half as much floor space. And the retail value of the location is different. You have greater pedestrian traffic there, but for a distributing company it loses some value by being mired in with retail distribution.

Q. Coming to the new location of Wiggs and Galigher, what about the Wiggs building as compared to what he had?

A. It is also a one-story building, little nicer quality building, I believe, than the other one, as far as structure; a little newer. The other has been up longer.

Q. Compared to what he had in the Terminal Building?

A. The Terminal Building was older. The one he is in is newer.

Q. As to construction?

A. The construction of the new building, of this one, is

better than some of the others you asked about as compared with the Terminal Building. That was a mighty good building, in its day. Age has crept up on it in the meantime.

Q. We are talking about Wiggs now.

A. Yes.

Q. For the purposes of Mr. Wiggs, was the space he has now, the location he has now, any better or any worse than what he had?

201 A. He is farther away from his center, from his so-called population center for his type of business. The street, for a retail business, would be, I think, if anything better than the other, as far as the street is concerned, if he were in the retail business. I see no improvement in it for his type of business.

Q. For his type of business and for the availability of space on November 11, 1942, would you say he has done the best he could in this location in securing it for his type of business?

Mr. Clay: I object to that, if your Honor please, as purely speculative, and immaterial, and permitting this witness to pass upon the judgment of Mr. Wiggs.

The Court: He may answer.

Mr. Clay: Exception.

(Last question read by the reporter.)

A. I think that is correct.

Q. Do you think Mr. Wiggs gained anything by moving down where he is?

A. Yes, he got more floor space.

Q. I mean aside from the physical fact of more floor space. Do you think he is better off than he was?

A. I think he has a greater distance between his operations. I imagine it costs a little more to operate—to cover that entire space, than to have his operation more concentrated, in a building that fits him.

Q. What I want to get at, is he about the same as
202 he was, or better off, or worse off?

A. I think, all in all, he is no better off, and not a great deal worse off.

Q. Is the rental he is paying there a reasonable rental?

A. Yes, I think so.

Q. What about the place where the Independent Pneumatic Tool is?

A. Yes, I think that is a reasonable rental.

Q. You know what the rent is?

A. Yes. Fifty and sixty dollars.

Q. The Galigher, is the rent they are paying in the new location reasonable?

A. It is.

Q. Do you know of any space available on November 11, 1942, that they could have occupied other than the place they went?

A. There were other spaces, but not ground floor space that compared—that would be suitable for their use, I imagine.

Q. Do you know of any other than where they went?

A. It is hard to remember now, exactly an individual space. But there were very few spaces. We knew they were looking for space, and recommended this space, as a matter of fact.

Q. Are they any better off or worse off than they were where they were located, or about the same?

A. They didn't want this location. I think the building is better than the other building,—much better as to structure.

Q. Is the space any better?

A. It is broken up so they have less space on the ground floor. As I observed their operations, their desks fit
203 into the space; they seem to be functioning in there.

Q. Is it an advantage or disadvantage to have to operate on the ground floor and the mezzanine as against the ground floor?

A. Generally speaking, it would be a disadvantage. May be cases where there would be some advantage to it, where a degree of privacy is needed.

Q. Leaving out any consideration of the location for their particular business, physically are they any better-off where they are, or worse off, where they are, than where they were or about the same—the actual operation in their business?

A. You put a business into a newer building, you sometimes think the employees have a little more pride in their

operation. I like to think a business is better off in a better, newer building than in an older building. But in actual operation it doesn't necessarily work out that way.

Q. You knew what they had in the Terminal Building?

A. Yes.

Q. The quarters weren't dilapidated, were they?

A. No, they had a new floor in there. It was cleaned up.

Q. Their fixtures were what?

A. They had desks, lamps on the desks. Now they have lights suspended from the ceiling.

Q. Did their quarters look all right where they were in the Terminal Building?

A. Yes.

Q. They were up-to-date, efficient?

204 A. For a distributing company they undoubtedly were very efficient.

Q. About the same now, or better, or worse?

A. Same type operation.

Q. Any other facts that we should know about that were disclosed by your personal investigation of the two locations of these four properties, the old and the new?

Mr. Clay: I object, unless a specific question is put to him.

The Court: I think that is the better rule. This witness doesn't indicate it, but I have known witnesses to be turned loose that way and I had to stop them.

By Mr. Jones:

Q. Will you answer it yes or no,—have I left out anything that your study discloses that would be of value to us in determining the relative comparison between these two locations? Just answer yes or no.

The Court: That is the same question. If he has, I will let you recall him after you talk to him.

Mr. Jones: May I ask him now, to save recalling him?

Q. Mr. Woodbury, I am going to ask you what the value of the occupancy of these old premises was on November 11, 1942, and the assumed evidence that I give you will all be assumed to determine that question. You are not to take them as independent items of damage, but as having a bear-

ing upon the value of the occupancy of those premises on that date.

205 Now, do I make myself clear? That is the ultimate question that I am going to ask you,—what is the reasonable value on that date of the right to occupy the premises by Grocer Printing Company, by the Independent Pneumatic Tool Company, by the Chicago Flexible Shaft Company, Mr. Wiggs, and the Galigher Company. That is the ultimate question. And all the other evidence that I shall ask you to assume will be directed to determining that value. Do I make myself clear?

A. I understand what you say. I may not understand what you are trying to get at.

Mr. Clay: Before you start, may all this go in under our objection?

The Court: It may be so understood.

Mr. Clay: And an exception to the court's ruling.

The Court: Yes.

By Mr. Jones:

Q. Assuming that the Grocer Printing Company, in vacating their property in the Terminal Building had to move to 147 South West Temple, where they are now located, and assuming the factors that you have already testified to, the rent they were paying, what they got for that, the rent they are now paying and what they have to pay in addition for heat and so on, and that they had to take a five-year lease in order to get the property, that that property was one of the few where direct current was available to them for the operation of their presses, and that their actual costs
206 of moving and setting up their machinery, fixing their signs, cleaning up, kalsomining, and putting supports under the presses so the floor would hold them; that new floor has been estimated at a cost of \$725; urinal and washstand to be installed, \$90; electric work yet to be done in two rooms, \$100; and that the employees were used exclusively in moving for a period that cost \$850 by using just actual payroll, so that the total of out-of-pocket expense including the increased rent and increased heat is \$9,741.34, with the addition of an insulating cost of \$524

that you have estimated, which would make a total if that insulation is done of \$10,265.34, that Mr. Grimsdell has paid or will have to pay for his actual out-of-pocket expenses in moving, and having in mind the location where he now is as compared to where he was, what would you say was the reasonable value of his occupancy—what was it reasonably worth to him to stay where he was in the old Terminal Building and what was the reasonable value of his occupancy of those premises on that date?

A. I would say \$12,500.

Q. Now, the Independent Pneumatic Tool Company—

Mr. Jones: Have you any objection if I tell him to consider the same items and give the figure without going through the whole rigamarole again?

Mr. Clay: Not a bit.

Q. Considering those same items, Mr. Woodbury, in connection with fixing the value of the occupancy of the premises of the Pneumatic Tool Company in the Terminal Building, and assuming they had to pay their out-of-pocket expenses for increased rent and moving plus an estimated expense of thirty-five dollars in additional plumbing that will be required in the new premises, making a total out-of-pocket actual expense of \$1584.31, what on November 11, 1942, would you say was the value of their occupancy of their premises in the Terminal Building?

Mr. Clay: Before you answer that, may the record show that the concession I made does not constitute a waiver of our general objection.

Mr. Jones: Yes.

The Court: That is understood.

A. Thirty-five hundred dollars.

By Mr. Jones:

Q. Bringing your attention now to the Wiggs property, —Chicago Flexible Shaft property, and taking into consideration all the elements that I have called to your attention in the previous questions concerning Mr. Grimsdell, and assuming that the actual out-of-pocket expense for moving was \$3414.73, what would you say was the value of the oc-

cupancy of the property occupied by Mr. Wiggs on November 11, 1942?

A. \$4500.

Q. Coming to the Galigher Company and assuming all the elements that I have called to your attention in the previous question with reference to Mr. Grimsdell and assuming that the out-of-pocket expense in moving of the Galigher Company was \$4,949.15, what on November 11, 1942, was the value of their occupancy of the premises in the Terminal Building?

A. \$7500.

Mr. Jones: You may cross-examine.

Cross Examination.

(By Mr. Clay:)

Q. Mr. Woodbury, you say the damage to the Grocer Printing Company was \$12,500?

A. Yes.

Q. On November 11, 1942, the Grocer Printing Company in this court here was given until December 1, 1942, to vacate the premises. Had you or your real estate agency been the agent of the Terminal Building on November 11, 1942, and you had given the Grocer Printing Company notice to vacate on or before December 1st, and they had done that and had presented you with a claim of \$10,265, would you have recommended to your client that they pay it?

Mr. Jones: I object to that as entirely incompetent, irrelevant in this case, not the measure of damage.

The Court: Present claim for what?

Mr. Clay: \$10,265.34; that is the amount they are claiming here.

The Court: In that form the objection will be sustained; but you can find out from him what that ten thousand dollars is made up of.

Q. (By Mr. Clay:) You stated the reasonable value of his damage was \$12,500. Of course I take it you think that is what damage he suffered, is that right?

A. That is correct.

Q. But if you had been agent of the building, real estate agent, and the Grocer Printing Company was a month-to-month tenant without a lease, and you on November 11th had given them notice to vacate on or before December 1, 1942, and if they had presented a claim for \$10,265.34, would you have recommended to your client that that was a legal, lawful claim?

Mr. Jones: Just a moment. I object to that as incompetent, immaterial, not the measure of damages.

The Court: Yes, that is not a proper question for him to answer in that form, what he would recommend to somebody, and if he had given him notice—that is assuming he had any authority to give notice to terminate the lease.

Mr. Clay: May the record show an exception.

Q: Assuming that your client, the owner of the building, had authorized you to give them notice to vacate under the same circumstances on November 11th, to vacate on December 1st, and for a tenant from month to month, not holding a lease, and they had presented a claim to you for \$10,265.34, would you have considered that a reasonable claim and a legal claim, and would you have recommended to your clients that they were liable for it?

Mr. Jones: Object to that as incompetent and immaterial, not the measure of damage.

210 The Court: I think so. If the owner of that building had, as he says they did in Chicago, cleared the building of tenants, it would be of some importance. The government did not take that method in this case.

Mr. Jones: The landlord didn't give any notice.

The Court: They didn't request him.

Mr. Jones: It is immaterial what the landlord would have done.

The Court: I will say to you, in my opinion it is proper to ask him, in view of the fact they had no lease and it was terminable at any time, and in view of the apparent increase in rent for the particular period, and assuming the probability of his remaining there at that sort of rental for

an indefinite length of time, what would he have to say about the damages, or what should be the measure of damages?

Mr. Jones: I think, projected further, there should be included, so far as the evidence discloses, that there was no intention of moving on his part or on the part of the landlord, so far as the evidence discloses.

The Court: Wouldn't make any point about that, because the evidence doesn't disclose anything—

Mr. Jones: Discloses they had never had any intimation—

The Court: They had no intimation of it; they just had a new landlord, too. And the government could have bought these premises.

Mr. Jones: But it did not.

211 The Court: It did not. It assumed to become the landlord. Certainly if it became the landlord it would have a right to make the lease.

Mr. Clay: May the record show an exception.

The Court: But in the form the question is asked, I will sustain the objection.

I might explain to both sides, when we argue this case the basic question is the amount of damages that results from taking over the property of the tenants, and such amount as would be reasonable compensation to be paid by the government for this taking over should be limited by the consideration that the government by so doing did not undertake to set up these people in a new business at a new location. They couldn't go out and buy a piece of land and build a house on it and say the government ought to pay for it, because they couldn't get a location anywhere themselves,—something of that sort.

Purely a question of what under the circumstances—the character of lease they had—that the government should pay them as reasonable compensation for their having to move out. The rent might be different, the building might have to be reconstructed according to their notion, but it

would all be new, and it would last a long time. Painting a sign might last for ten or fifteen years. The government is not called upon to pay for signs that might last that long at some new place.

212 All of those things must be taken into consideration, and that is the purpose of this testimony, to try to reach what would fairly and reasonably compensate them for moving out of the place they had been accustomed to occupy at a certain rental, at which they were all arranged to carry on business as they had done, to a new place, and not for any particular term of years, but for that removal, the change that would come about. They are bound to readjust themselves to their new location sooner or later. The government is not for all time called upon to pay their additional rent at this new place. Must be some limitation put on it.

In view of all of these expenditures and the new location and the right of the government to take over this property by paying reasonable compensation, what would be reasonable compensation? I am willing to let you investigate that theory of it from any standpoint, but not by asking him what he would tell his client to do.

Mr. Jones: I may say this: my view of it is, this question of a month lease is a mere question of argument. The jury is just as able to fix that as the next person. It is a matter purely of argument. They have the evidence before them now.

The Court: Except Mr. Clay contends because they did not have any lease at all they would not be entitled to recover anything.

I am going to leave that to the jury.

Mr. Jones: That is a matter of argument, not a matter of law or testimony.

213 The Court: He is contending it is. I am only saying the court is ruling for the present that is not the law.

By Mr. Clay:

Q. Mr. Woodbury, if you had been agent for this build-

ing and your client had authorized you on November 11, 1942, to notify the Grocer Printing Company to move on December 1st, and if they had moved, and knowing all the facts that you do know, would you consider it would be a legal and lawful claim of \$12,500 to be paid the Grocer Printing Company?

Mr. Jones: Object to it for the same reason.

The Court: The objection will be sustained.

Mr. Clay: Exception.

Q. If you had been agent for this building, and you had on November 11, 1942, notified the Independent Pneumatic Tool Company to vacate the premises, and they had vacated on November 17, 1942, and knowing the facts as you do know them, would you have considered that your client was liable to the extent of \$3500 damages, and would you have recommended to your client that it be paid as a legal and lawful claim?

Mr. Jones: Same objection.

The Court: Same ruling.

Mr. Clay: Exception.

Mr. Clay: I will withdraw the question as to the Independent Tool Company for the time being, if your Honor please.

214 Q. If you had been agent for the building and your client had notified you and instructed you to notify

Mr. Charles F. Wiggs, doing business as the Chicago Flexible Shaft Company, on November 11th, to vacate the premises, and they were tenants from month to month, and they vacated on November 17, 1942, would you have considered that their damage was \$3500, and would you have recommended to your client to pay that as a legal and lawful claim?

Mr. Jones: Same objection.

The Court: Same ruling.

Mr. Clay: Exception.

Q. If you had been agent for the building and your client

had instructed you on November 11, 1942, to notify the Gallagher Company, who were tenants from month to month, to vacate the premises, and they had vacated on November 21, 1942, would you have considered their damage in the amount of \$7,500 to be reasonable damage, and would you have recommended that amount to your client to be paid as a legal and lawful claim in order to avoid a lawsuit?

Mr. Jones: Same objection.

The Court: Same ruling.

Mr. Clay: Exception.

Q. You have been in the real estate business about twenty-four years?

A. Yes, sir.

Q. During that time you have had, I take it, many tenants who rented properties from you from month to month, have you?

A. Yes, sir.

215 Q. What is the ordinary and customary time, the number of days' notice to give a tenant from month to month?

Mr. Jones: Object to that as not within the province of this witness, a conclusion of law, not proper cross-examination.

The Court: I think I will let him answer. I believe it is statutory.

Mr. Clay: Yes, it is statutory.

Q. Under the statutes it is fifteen days, isn't it?

Mr. Jones: I object to this witness testifying about the statute.

The Court: He may answer

A. I have understood and acted on the premise that you could legally give a tenant notice fifteen days prior to the expiration of his rent.

Q. Have you sometimes done that, Mr. Woodbury?

A. Only where it was a very objectionable tenant and I needed to take action.

Q. If you needed the space for some reason and your

client instructed you that they desired that space, you would give them notice to vacate, wouldn't you?

A. Yes.

Q. And under such circumstances have you ever paid a tenant for removing from the premises?

Mr. Jones: Object to that as immaterial.

The Court: The objection will be sustained.

Mr. Clay: Exception.

216 The Court: Might be they might pay him for improvements of some sort that they wanted to keep. We don't want to go into that.

Mr. Clay: I mean just pay him a sum of money for moving.

Mr. Jones: Objected to.

The Court: If for that purpose, the objection will be sustained.

Mr. Clay: Exception.

Q. Under such circumstances have you ever compensated a tenant for putting in electric signs at his new location?

Mr. Jones: Objected to as irrelevant and immaterial.

The Court: The objection will be sustained. All depends on what the understanding was.

By Mr. Clay:

Q. Or for the expense of moving?

Mr. Jones: Same objection.

The Court: Same ruling.

Mr. Clay: Exception.

Q. Or for linoleum on the floor?

Mr. Jones: Same objection.

The Court: Same ruling.

Mr. Clay: Exception.

Q. Or for labor and material made necessary in accomplishing the removal?

Mr. Jones: Same objection.

The Court: Same ruling.

217 Mr. Clay: Exception.

Q. Or would you say that is the custom among real estate dealers in Salt Lake City?

Mr. Jones: Same objection.

The Court: Same ruling.

Mr. Clay: Exception.

Q. Have you ever known it to be done under any circumstances?

Mr. Jones: Same objection.

The Court: Same ruling.

Mr. Clay: Exception.

The Court: You just as well try this case on the court's theory. You are not adding anything to your case by this repeating of the same question. You have a record.

Mr. Clay: I want to be sure to get it in the record.

The Court: You have it in the record. To review the question where there is no term lease they are not entitled to recover anything.

Mr. Jones: He got that in the record when the court denied his motion for summary judgment.

By Mr. Clay:

Q. On the Independent Tool Company you placed the damage at \$3,500. Was that estimate of \$3,500 based entirely upon the elements listed by Mr. Jones in his question, or did you take any other element into consideration?

A. I did. I took some other elements into consideration.

Q. In addition to the elements—of course Mr. Jones in his preamble told you to take into consideration only
218 elements he mentioned, didn't he?

A. I didn't understand it that way.

Q. What other elements did you take into consideration, Mr. Woodbury?

A. The right to continue; the fact they were there, the right to continue occupancy, peaceable possession.

Q. That was in his question. Any other element?

A. Quite a number.

Q. I mean outside of what was contained in his question.

A. Pretty hard to remember everything in that long question.

Q. Let me ask you the same questions about the others. In the Grocer Printing Company did you take into consideration any elements other than those incorporated in Mr. Jones' question?

A. I did.

Q. Of course you understood you should not have, didn't you?

A. No, sir.

Q. Can you tell us what other elements you took into consideration in the Grocer Printing?

A. Again, the occupancy of the place.

Q. That was included in his question.

A. Which involved all the elements, location, desirability of it, and so on.

Q. I will ask you if you took into consideration any other element other than those contained in Mr. Jones' question as to any of the tenants—Galigher or any of them?

A. I think there was one element he didn't mention, that is the fact those seemed to be the highest and best uses of that particular property. I don't recall his mentioning that.

Q. Yes, I think he did.

Outside of the elements included in his question and those you have just mentioned, there were no other elements upon which you based your answer?

A. There may have been some elements. I did my own figuring, and in some cases, on some estimate, my figures might not agree to some that have been given. My figures on some of them might not coincide identically with the figures that have been given.

I recall one at this time, for instance.

Q. What is that?

A. The cost to Grocer Printing Company for that warehouse space.

I don't think they figured that, because they haven't got a bill for it. I don't think they figured it cost them anything. They are going to pay for it if they continue to use it.

Q. Warehouse space?

A. Yes.

Q. That was the space that the Western Printing Company—

A. I didn't examine the space. I asked what was contained there; attempted to estimate how many square feet it would take to house it; it was a substantial space, enough to pay rent on.

Q. What do you mean by "substantial space"?

220 A. It wasn't just the size of an office desk.

Q. How big was it?

A. I estimated it had about 450 square feet in it.

Q. I think that is what he testified to—15 by 30. And what did you estimate the expense there?

A. I figured that is worth, for just dead storage space, \$7.50 a month.

Q. For how many months?

A. For the operation of his lease, its present occupancy of five years, totaling \$450.

Q. Why limit it to the lease? Why not make it ten years?

A. May not be there after that.

Q. He may not use that space in a year from now.

A. He is obligated on his lease for that long.

Q. I am talking about this extra space on the premises of the Western Newspaper Union. That is the one you have in mind?

A. It is a space at some location; I am not sure it was the Western Newspaper Union.

Q. You are proceeding upon the assumption that he will continue to occupy that space for the next five years and pay \$7.50 a month for it?

A. The only way you can arrive at—

Q. Will you answer that yes or no?

A. How did you ask that question?

(Last question read by the reporter.)

A. No, I am not saying that is the case. I am
221- saying it is the value of that.

Q. Did you compute it at the rate of \$7.50 a month for the next sixty months?

A. Correct.

Q. And of course you have no way of knowing if Mr. Grimsdell will be required to pay anything for that space, have you?

A. No, sir.

Q. You have no way of knowing whether he will be there one month longer or sixty months longer?

A. No, sir.

Q. With reference to the values you placed on some of these other companies, Galigher and Wiggs and the Tool Company, did you take into consideration such other problematical items as the one you just last mentioned?

A. I took into consideration all of the items I could feature as reflecting the true condition there.

Q. Can you mention some others?

A. I would have to just by comparison with their sheets. They weren't material items of any consequence. I did take into consideration insulating in those cases where it seemed necessary, insulating the ceiling.

Q. For the Grocer Printing?

A. I did that not only for the Grocer Printing, I did that in other cases, too; not in the case of Galigher; they have a building that would not require it.

Q. Insulating in the Grocer Printing and who else?

A. The Independent Pneumatic Tool Company.

22 Q. Were you in court when Mr. Sam Baird testified?

A. Yes.

Q. Did you hear him testify?

A. Yes.

Q. He said nothing in his entire testimony about insulating that building, did he?

A. I don't recall whether he did or not. I don't believe he stated any figures.

Q. As a matter of fact he did not state that the building was insulated or that they contemplated insulating it, did he?

A. He may not have done; I am not sure.

Q. What figure did you allow for insulating his building?

A. \$175.

Q. Did you take into consideration any other element in consideration of the Grocer Printing Company, the Tool Company or anybody else?

A. I think there is nothing—let me see—they have the cost of installing a washbasin and that water heater in their figure?

Mr. Jones: Yes.

A. (continued:) I would say yes, in general; I may be in error in some particular.

By Mr. Clay:

Q. What do you mean by "yes, in general"?

A. I think I have not taken into consideration any major items, although there are some minor items; for instance, the Wiggs deal, I believe I added a fifteen-dollar item 223 for putting up some awnings, from the fact the awning he has on his old place wouldn't be wide enough for the new.

Q. Did he move that old awning?

A. I understand so.

Q. Any other items that were not included in Mr. Jones' question—any of them—Wiggs or aligher?

A. Did you get the Grocer Printing item? Yes, I gave that. I think that is about all.

Q. Mr. Woodbury, were you on the premises of the Terminal Building on or about November 11th?

A. No, sir.

Q. You have been on the premises since that time?

A. Yes, sir.

Q. How long ago?

A. I have been on several times.

Q. Just recently, though?

A. Yes, ever since the army took possession.

Q. Are you sufficiently familiar with the building, or can you describe the condition the building was in on or about November 11th? Were you on the premises close enough to that time to give us a description of the building as of that date?

A. I was generally familiar with it, as one is in the business, seeing buildings, and I noticed the painting operations start, and so on.

Q. Quite an old building, isn't it?

A. Yes.

Q. Do you have an idea how old it is?

224 A. Yes, I have an idea. This is not accurate, but if I were estimating I would say pretty close to fifty years.

Q. Were you upstairs on the second floor of the building any time during the month of November or October—any time in there?

A. Of 1942?

Q. Yes.

A. No, sir.

Q. How long ago has it been since you appraised the building—1935, did you say?

A. It has been eight years; may have been a little later than that.

Q. At that time you appraised it in connection with Mr. Kiepe and some other man?

A. No, I appraised that for a private corporation.

Q. You were valuing all the property in Salt Lake City with Mr. Kiepe and others?

A. That was at a different time.

Q. For assessment purposes?

A. That was just the land.

Q. You appraised that building in about 1935 or 1936 for some private individual?

A. Yes.

Q. At that time did you go all through the building?

A. I did.

Q. Upstairs?

A. I did.

225 Q. What was the condition at that time?

Mr. Clay: This may be too far away; I am not sure. I believe it is too far away.

Q. Why did you place the value of \$12,500 as the reasonable damage to the Grocer Printing Company, Mr. Woodbury? Why is that?

A. Seemed to be the reasonable and fair value of their proposition that they had there, the right to occupy it in that location.

Q. Is that because they had been there for quite a number of years?

A. That is an element.

Q. And any other element?

A. Yes.

Q. What?

A. The suitability of the location, first. The fact he had been there quite a number of years. The fact he was doing a successful business there. The fact that it was available for the type of business now being done, even though that has undoubtedly changed over a period of years. The fact he had a very reasonable rental.

Q. Why was his location especially suitable for the printing business?

A. Well, he is close enough to the business district that he didn't have to waste too much time getting back and forth, and yet on West Temple it is a low rent area.

Q. Where is the business district?

226 A. The business district centers between Second and Third South, on Main street, what we consider our one hundred per cent business, that is, retail business.

Q. Now he is just a little north of Second South on West Temple?

A. Yes.

Q. How much farther away from the business district is he now than he was before he moved?

A. I don't think he is any farther away.

Q. Just as close now as before?

A. Yes.

Q. So we may eliminate that element. Is that right?

A. I think so.

Q. What other element did you consider?

A. The fact he doesn't have as good a building to be in now as he had before.

Q. Would that affect the quality of work he would do in the printing business?

A. No, but I think it would affect his operation.

Q. What do you mean by that?

A. I think in a building that is not suited to your needs you can not operate as well.

Q. Why?

A. If the suit doesn't fit you, you can't—

Q. Tell us about the printing business, why he can not operate as well? He has his machinery over there.

A. Divided into sections where he can't see his
277 men operate. Waste space for aisles. I walked up
and down those. His area devoted to aisle space is
greatly increased as a result of the divisions, the units being
separated rather than one large area.

Q. That merely reduces his floor space, doesn't it?

A. It reduces his proportionate usable floor space as
compared with the total area, if it were not in a series of
separate units.

Q. If a man is working at a machine in the new location,
can not that particular workman do as much work on that
machine just as efficiently as he could in the old location?

A. As far as area is concerned, I imagine so.

Q. If Mr. Grimsdell wants to walk through and see what
they are doing, he has cut through the partition a space for
him to walk through, hasn't he?

A. Yes.

Q. Any other element you think of?

A. I think that very element of having that waste space
there is a decided element in accessibility to his machine—
has to go from one place to another, clear around up an-
other aisle to get at it. He can't supervise his men.

Q. Usually have one man work on a machine, don't you?

A. One supervisor for a group of them.

Q. He doesn't walk up and down the aisle all day super-
vising the work, does he?

A. I don't know.

Q. How about competition? Any more competi-
228 tion up there than the old location?

A. No, I don't think there is. I didn't see another
printer in that particular block. There may be one—I don't
recall.

Q. Printers all through there, aren't there?

A. A number of printers on West Temple.

Q. On Second South?

A. I would have to go up and down the street to locate
the shops. It would be a suitable location for a printer, I
would say, in that general area.

Q. So in so far as the competition is concerned, he is just
as well off as in the old location?

A. You are assuming in your question, I take it, the
fact he is away from others would improve—

Q. No, I don't say he is away. He is not any worse off, is he?

A. I don't think there is a great deal of difference in that, one way or the other.

Q. With reference to Mr. Wiggs, I believe you said he was no better and no worse; is that right?

A. You mean as to what element?

Q. As to his location.

A. As to his location—no, I didn't mean to say that. I meant I think he is farther away from the source of the type of business that drops in on him. He is no better or worse as far as the mail order business is concerned.

Q. In his business he testified, I think, that he had to go out and get the business; that it is not the character of business that would drop in, like buying a
229 cigar or a package of gum?

A. I understood these sheepherders or shearers travel through here annually, and they do drop in; that is my understanding, that there was some over-the-counter business.

Q. He said they dropped in and usually stopped at the Cullen hotel?

A. Yes.

Q. Did you take that into consideration as an element of damage in his new location?

A. Yes.

Q. How much did you allow for that?

A. I didn't set a specific figure for it; it is a matter of judgment.

Q. What did you base your \$7,500 for Galigher Company on?

A. The same general element.

Q. What do you mean by that?

A. The location feature, known to the trade. In their case they have a little different situation. They have a substantial value built up over a period of years. Their volume is greater. It is a bigger thing to move them out of that spot than some other where it is a smaller business. They might find it would take them longer, have to spend more money to put their business back in the other location. That is one item.

Q. They sell machinery, don't they?

A. Yes.

230 Q. I believe he testified his firm does engineering jobs; it is not just a little ten-cent business. If you want an engineering job done you would look up the Galigher people, no matter where they were located, wouldn't you, ordinarily?

A. I imagine you would look up the business you wanted, the personnel.

Q. Isn't that true of Mr. Wiggs' business and of the printing business?

A. Certain elements of their business, undoubtedly.

Q. As a general proposition don't you think their new location, having a better building over there, when their customers find out where they are located, that it will serve their purpose just as well as the old location?

A. They would rather have the other location. It would be more suited to them.

If I were trying to locate a tenant like them I wouldn't try to put them on Second East; try to put them in the general neighborhood of their type of business.

Q. Any other reason other than convenience?

A. Convenience takes in a lot of territory.

Q. But that is the main thing?

A. Convenience to the public is the greater item, rather than convenience to themselves—though it is convenient to them to be close to those businesses they serve.

Q. But don't you think, as you said a moment ago, if they were looking for the Galigher Company or the Wiggs company they can find them in the new location as
231 well as the other?

A. Certain types of business, yes.

Q. Let me ask you, do you know that the Terminal Building was in a rather run-down condition, very bad shape?

A. That is a comparative statement. It was worse the first time I made a thorough investigation of it than it was later. Some improvements had been made. I wasn't in it for a year or two, and then they made certain improvements. I have forgotten just how long, but it was gradually being improved.

Q. Was it generally known in real estate circles that

the Metropolitan Life Insurance Company had been trying for several years to sell this building?

A. I think so—I wouldn't say trying for several years to sell it; the agent for the Metropolitan would know that. But I know it was generally known they had it and most of their properties are for sale.

Q. Going to the question of leases, I would like to have you express an opinion, if you will, whether or not it is good business for a big firm like the Galigher or the Grocer people to run along year after year and not have a lease?

Mr. Jones: Objected to as incompetent, immaterial, not the proper measure of damage.

The Court: I think that is preliminary. He may answer.

Mr. Jones: Exception.

A. We generally consider an understanding is a very valuable asset—an understanding of continued use; it may be in any form you choose to adopt. Month to month would have less value than no written lease, unless there was an understanding that accompanied it.

Q. Of course if there was a verbal understanding it would not be enforceable, would it?

A. As between the two parties it has a degree of integrity.

Q. I mean legally.

A. I generally refer those things to some attorney.

Q. Going back, Mr. Woodbury, to your leasing of property—not leasing, but appraising of property for the government, I think you told Mr. Jones that ordinarily you looked to the landlord to settle with his tenants. Is that right?

A. Yes.

Q. And that was done as a matter of good business, wasn't it?

A. Yes, we felt it was proper.

Q. When the United States government went to take a building for any purpose, they didn't deal with the tenants separate and apart from the landlord?

A. No, sir.

Q. They went right to the landlord and arranged for a lease with the landlord, and let him settle with his tenants?

A. In cases where we made a lease deal with the owner?

Q. Yes, if you were going to lease a building from the owner.

A. The government did, I believe, in one or two cases where we were forced to fill out some little corner where they had to institute proceedings to round out the tract, just a minor item. If it was a major item we would have dealt with the landlord and he would have to acquire possession for us.

Q. You said in your opinion a month-to-month tenancy wasn't as valuable as a lease?

Mr. Jones: I don't remember him saying that.

The Court: He said it was of less value.

Mr. Clay: Not as much value.

Mr. Jones: I understood he said it might or might not; depended on the parties.

The Court: He added that in his talk about the understanding.

Mr. Jones: Integrity of the parties.

By Mr. Clay:

Q. Regardless of any sentiment, do you think that a month-to-month tenancy is of any value at all?

A. Yes.

Q. Do you think it could be sold in the market?

A. No.

Q. You would not consider it as a property right in a building, would you?

A. On a technical question I don't know just what property rights may be.

Mr. Clay: I think that is technical. I will withdraw it.

I think that is all, Mr. Woodbury.

Redirect Examination.

(By Mr. Jones:)

234 Q. When you made your arrangement for these removals of governmental departments from Washington to the cities you have enumerated, you made your deals

with the landlord. Did you allow the landlord sufficient to take care of his tenants?

A. We made the deal with the landlord on a voluntary basis, that is, a basis the landlord was willing to accept. It was by negotiation.

Q. The basis he was willing to accept, with the understanding that he would take care of his own tenants?

A. Willing to accept, on a basis the government would also accept, of course.

Q. Under the understanding that the figures you allowed him were satisfactory to him to take care of his own tenants from them?

A. That is correct.

Q. Is there such a thing as a mining and machinery district in this city, if you know?

A. I think quite well established.

Q. Where is it?

A. Around Second South and West Temple.

Q. Were these people in that district in the Terminal Building?

A. Yes.

Q. Are they in it now?

A. No, sir.

Q. Now in the figures I asked you to consider in making your estimate of value I gave you \$10,265.34 for the Grocer. In your estimate of \$12,500 I now understand you have included an additional \$450 for rental space for these machines that he can not store in his own property?

A. That is included in the twelve thousand dollars.

Q. Plus \$524 for insulation?

A. That is right.

Q. So that those two items, \$974, are included in your estimate of \$12,500?

A. Yes, sir.

Q. I did include \$524 in my figure of \$10,265.34, so that leaves Grimsdell the only other figure that you have that I didn't give you is the \$450 for storage space for those machines, is that right?

A. I think that would be correct. My sub-totals work out differently than yours, so I can't remember them correctly.

Q. I want you to take into consideration the figures I gave.

A. Yours were \$10,265 in that case.

Q. That \$10,265.34 includes the \$524 for insulating.

A. I get \$10,715 for what I have as the total of those figures. I may be in error.

Q. I want you to take the figures I give you, \$10,265.34 for Grimsdell, and on that basis fix the value of his occupancy.

A. \$12,500.

Q. You don't change it any?

A. No.

Q. And of the Independent Pneumatic Tool Company, I gave you the figure of \$1,584.31, and you included \$175 for insulating, which I did not include.

Take my figures, \$1,584.31—what is your estimate of the value of that occupancy on that date?

A. \$3,500.

Q. And Wiggs, a figure of \$3,414.73—is that the figure you have?

A. It would still be \$4,500.

Q. And Galigher was \$4,915?

A. \$7,500.

Q. So that the difference between the actual out-of-pocket expense and the figure that you give, as I now understand your testimony, is for the length of time they had been there, the established business, the locality, nature of the locality and the kind of business that was carried on, and on those intangible elements you start in making up the difference between the actual out-of-pocket expense and the value you have given it?

A. That is correct.

Q. You knew the length of time they had been there and all those things?

A. Yes.

Mr. Jones: I think that is all.

Re-Cross Examination

(By Mr. Clay:)

Q. In other words, as I understand you now, Mr. Woodbury, in so far as Grocer Printing is concerned, they have shown by their statement here that they claim \$10,265. You

have fixed the damage at \$12,500, making a difference of \$2365. You figure that their position on a month-to-month lease was worth \$2365?

A. That difference would not quite agree with my figures.

Q. Taking Mr. Jones' figures, whatever they are, based upon the value of that month-to-month tenancy, is that right?

A. Yes.

Q. And the difference on the Independent Tool Company, they put in a claim of \$1584. You allowed them \$3500. Leaving a difference of \$1900 in round figures?

A. Again, that would not be the difference there, because you haven't included all the items. That wouldn't be the difference for intangibles.

Q. I don't know what you mean.

A. You didn't include some specific items that were discussed in your figures you have given me.

Q. For instance, what?

A. The insulation of the ceiling.

Q. Mr. Jones said he included that in his \$10,265.

A. We left that. I thought you were talking about the Tool Company.

Q. The total of the Tool Company is \$1584.

A. Not including that.

238 Q. You added how much for insulation?

A. \$175 for insulation?

Q. Roughly, \$1500 for the possession?

A. Well, that is approximate.

Q. And with the Wiggs Company, the difference between \$3400 and \$4500, or roughly, \$1600?

Mr. Jones: Roughly, a thousand dollars.

By Mr. Clay:

Q. Roughly, a thousand dollars. You think that month-to-month tenancy is worth one thousand dollars?

A. Yes.

Q. Would you recommend to a client that he would pay twenty-three hundred dollars for a month-to-month tenancy?

Mr. Jones: I object to that as immaterial, without the other element.

The Court: The objection will be sustained.

Mr. Clay: Exception.

The Court: That is the same question you asked before.

Mr. Clay: That is the reason I hesitated to ask it.

I think that is all.

Mr. Jones: That is all, Mr. Woodbury.

I think, your Honor, with one or two matters we will rest.

I wish your Honor's permission to amend our amended Answer to conform to the proof.

239 Mr. Clay, may it be stipulated that while the action of the government sought condemnation for a period from 1945, which might have been reduced to 1944 or to 1943, that they now have closed with the landlord a ten-year lease?

Mr. Clay: I wouldn't stipulate it unless the landlord says, or his attorney.

Mr. Jones: I don't want any testimony. If you won't stipulate it, we will go on your complaint, on your petition. You know that is the fact. Mr. Stevens told you that the other day.

Mr. Clay: I want to get it in in proper shape. I want the landlord to testify or state into the record that they have settled with the government.

Mr. Jones: We are not dealing with the landlord. The landlord is no part of our case. If you will not stipulate that the government has entered into a ten-year lease, which is the fact, we will go on the petition of what you have asked for.

Mr. Clay: I can not stipulate in the absence of Mr. Roberts.

Mr. Jones: Will you take the stand, Mr. Stevens, and be sworn?

240 WILLIAM P. STEVENS, was thereupon called as a witness by and on behalf of the defendants, and having been first duly sworn herein, testified as follows:

Direct Examination.

(By Mr. Jones:)

Q. What is your name, Mr. Stevens?

A. William P. Stevens.

Q. Where do you reside?

A. I reside in Ogden City.

Q. By whom are you employed?

A. The War Department, United States Government.

Q. Where is your office?

A. 222 South West Temple, Salt Lake City.

Q. What is that known as—what building?

A. The old Terminal Building.

Q. Are you familiar with the transactions and negotiations in this case for securing a lease on that property by the War Department?

A. Yes.

Q. Has a lease been approved?

A. It has.

Q. For how many years?

Mr. Clay: Just a minute. I have no objection to this. Why doesn't Mr. Richards come in and say he is satisfied with it?

Mr. Jones: We have repudiated your theory of the case completely that we have a deal with the landlord. You haven't considered us at all.

The Court: Go ahead and make your proof.

By Mr. Jones:

Q. For how long a period? I am asking as to only one thing, that is the number of years that that lease covers.

A. The present lease covers a period from a date just the other day to June 30, 1943, with the option on the part of the government to renew each year for ten years.

Mr. Jones: That is all.

Cross Examination.

(By Mr. Clay:)

Q. Was the lease signed by Mr. Richards, the owner?

A. Yes, sir—Mr. Richards and his wife.

Q. Do you know if that was done with the consent of Roberts and Roberts, the attorneys in the case?

A. It was, yes.

Mr. Jones: I object to that as immaterial.

The Court: Wouldn't make any difference whether it was done with their knowledge or not.

By Mr. Clay:

Q. When was the lease entered into?

The Court: You mean the date of it?

Mr. Clay: Yes.

A. I don't remember the exact date. You have a copy of it there; just two or three days ago; seems to me it was March 28th.

Q. Can you tell us about when it was?

242 A. About March 28, 1943.

Mr. Jones: That is all. We rest, your Honor.

The Court: That is for your clients?

Mr. Jones: Yes, our clients.

Mr. Clay: We want to make a motion, if your Honor please.

The Court: You can make that after all the evidence is in.

Mr. Clay: I would like to make it now. The motion goes to all the defendants in this action.

The Court: Wait until we get somebody on the witness stand.

Mr. Smith: We are ready to go ahead.

The Court: Go ahead and make it with respect to some witness or other.

Call your next witness.

Mr. Smith: I would like to make a very brief statement, if I might, in reference to the Gray-Cannon Lumber Company.

Ladies and gentlemen of the jury:

The Gray-Cannon Lumber Company is a corporation of the State of Utah and was a tenant of the premises indicated on the map by the diagonal lines in blue, and having a frontage on Pierpont Avenue. As the map shows, West Temple street faces east; Pierpont Avenue at the corner south of the Terminal Building extends west to First West Street. There was a frontage on Pierpont Street that was occupied by the Gray-Cannon Lumber Company. They had been in there since about 1932.

They conducted a lumber warehouse business and also had their office over there, general wholesale lumber business in those premises.

They, likewise, were ordered into court, and on November 11th an order of court was issued requiring them to vacate the north room, which was designated as Room 102, by November 17th, and the south room, Room 100, by November 20th.

They complied with the Order, and claim compensation for the value of their occupancy of those premises at that time

Mr. Clay: If your Honor please, we have a witness here, Major Smith from California. He has his transportation arranged to leave tonight. And some time today I would like to call him as our witness, even if we have to call him out of turn.

The Court: What do you want to prove by him?

Mr. Clay: Just the condition the building was in at the time we took possession.

Mr. Smith: I would prefer he go on now, and we resume after he gets through.

The Court: You can do that if you want to.

Mr. Clay: I would like to make a motion before I put him on.

44 The Court: What is it?

Mr. Clay: I want to move that the case be dismissed.

The Court: If that is what you want, go ahead and make the motion.

Mr. Clay: Comes now the petitioner, United States of America, and moves that this action be dismissed, it now appearing that petitioner has entered into a lease with the landlord.

The Court: The motion may be denied.

If you are relying on a lease, let's put it in evidence.

Mr. Clay: I will, if I can find it. I believe I left it on my desk.

Mr. Clay: May I suggest that you go ahead with your case, Mr. Smith, and then I will call Major Smith some time this afternoon?

LEONARD ADAMS, was thereupon called as a witness by and on behalf of the defendants, and having been first duly sworn herein, testified as follows:

Direct Examination.

(By Mr. Smith:)

Q. Will you state your name, please?

A. Leonard Adams.

Q. Where do you reside, Mr. Adams?

A. 1453 Michigan Avenue.

245 Q. What is your occupation?

A. Wholesale lumber business.

Q. Are you engaged individually in that business, or in connection with some other concern?

A. Gray-Cannon Lumber Company.

Q. What position do you have with that company?

A. President and manager.

Q. Are you a stockholder in that concern?

A. I am.

Q. State approximately the percentage of stock you own in it.

A. I control it.

Q. How long have you been connected with the Gray-Cannon Lumber Company?

A. About ten years.

Q. Do you know how long the Gray-Cannon Lumber Company has been in business?

A. Since 1919.

Q. How long have you been president and manager of the company?

A. Between six and seven years.

Q. What are your duties as president and manager of the corporation, Mr. Adams?

A. To direct the management of the whole business—buying and selling of all kinds of lumber materials.

Q. Is there any one else who participates in the management of the business?

A. No, not directly.

Q. You, individually, have the full management and control, subject to the approval of the board of directors?

A. That is correct.

Q. Was the Gray-Cannon Lumber Company a tenant of the old Terminal Building that has been referred to here prior to November 11, 1942?

A. It was.

Q. What business was conducted in those premises, Mr. Adams?

A. General wholesale lumber business, and a jobbing business which included the distribution of lumber materials in less than carload lots.

Q. Did you have an office there?

A. Oh, yes.

Q. Will you state the nature of your wholesale lumber business Mr. Adams? Did you transact a wholesale lumber business generally?

A. We handle a great many carloads of all kinds of lumber, to the retail lumber yards, mines, smelters, railroads, different industrial businesses; a lot of shipping containers, boxes, baskets, barrels, a lot of that is in carload lots, direct sales. We buy the material and sell it, but we don't handle it. Through our warehouse we carried what we called a jobbing supply. Most of that is higher priced building material that the yards don't ordinarily buy in carload lots, —doors, windows, panels, hardwood flooring, siding, and different items like that.

Q. Do you handle common lumber through your warehouse?

247 A. No.

(Recess to Two P. M.)

Salt Lake City, Utah,

Wednesday, March 31, 1943: 2:00 P. M.

(After recess.)

Mr Jones: I am returning to the reporter Exhibits 4 and 6 with the additions to them.

LEONARD ADAMS, thereupon resumed the stand for further examination herein, and testified as follows:

Direct Examination (resumed).

(By Mr. Smith:)

Q. The last question, I think, Mr. Adams, I asked you was if you handled common lumber through your warehouse.

A. I think the answer was no.

Q. Where did you conduct your business, Mr. Adams?

A. 116 Pierpont Avenue.

Q. Is that in the building referred to here as the old Terminal Building?

A. It is.

Q. Can you describe those premises, Mr. Adams, that you occupied?

A. We had a frontage on Pierpont Avenue of approximately 52 feet. It extended back a distance of approximately 87 feet. That was one building. And in the corner of that we had our office.

248 Directly at the rear of that was another building, which was the rear of one of the buildings that came in from West Temple Street. It had been partitioned off. That was a little higher elevation than the other buildings. I think that was approximately 36 to 68 feet.

Q. Had you finished?

A. We had a floor space there of something over 7100-7162 feet. And in addition to that there was a mezzanine floor in the building that faced on Pierpont, that we used

for storage space, so we figured we had approximately eight thousand feet of space in our building that we occupied.

Q. Had you ever had a written lease of those premises?

A. Yes.

Q. Will you state when?

A. We had a three-years lease. That was in effect from August, 1938, until August, 1941—three-year lease.

Q. Did you have any other written lease after that time?

A. We had a lease submitted to us, yes, after that time.

Q. Who owned the building at the time your lease expired in 1941?

A. That lease was drawn by the Metropolitan Life Insurance Company.

Q. Who represented them locally here?

A. The Union Trust Company.

Q. And who dealt for the Union Trust Company in respect to that property?

A. Mr. Nielson, I think, was the representative that contacted us.

Q. Did you have negotiations after 1941 for a new
249 lease of those premises?

A. We did.

Q. Will you state what arrangements were made for a new lease, and what was done after that time?

A. There were several months that we continued paying just month to month rental. We did that because promises had been made about fixing up the premises a little. They were going to do that, and then we wanted a new lease. This lease was drawn, and dated August, 1942, for three years, and we didn't sign it. We held it there, waiting for some improvements to be made on the building, that is, some renovating, cleaning up. It was Mr. Nielson's suggestion that we would get more done if we didn't sign the lease. He stated they would be more apt to fix the building up for us if we didn't sign the lease. So we held it, and did not sign it. We didn't sign the lease, because they were going to fix a new ceiling for us and do some painting and cleaning the place up.

Q. Had you had an understanding with them about that?

A. That is right, we had.

Q. Did you have an understanding about signing the lease when these improvements were made?

A. Yes, we did.

Q. Any conversation as to whether you were continuing for a definite period of time in the meantime?

A. The new lease was drawn for three years.

Q. Were you ready to sign it as soon as the improvements were made?

A. Yes.

Q. That were requested?

A. Yes.

Q. And that lease would expire at what time?

Mr. Clay: I object to it as immaterial. It was not signed.

The Court: No harm in giving the date. But he has already said three years.

By Mr. Smith:

Q. Why weren't the improvements made?

A. I presume scarcity of labor more than anything else.

Q. Had estimates of the cost of it been made?

A. They had.

Q. And the lease had been prepared at your request?

A. That's right.

Q. What rent did you pay?

A. \$115 a month.

Q. What was included within that rent?

A. Heat and water. We were supposed to have some watchman's service. I don't know whether we got that or not. We paid a watchman of our own.

Q. You had a watchman of your own?

A. He was citizen police, or whatever they call them.

Q. How was the building heated?

A. Steam.

Q. And the entire warehouse was heated to what degree of temperature normally?

A. We kept some of the registers shut off to hold the temperature down; I think to possibly 60 or less.

Q. How about the heating of your offices?

A. It was very adequate.

Q. What was the condition of these premises when you first went over there, Mr. Adams?

A. Quite badly run down.

Q. Did you expend any money in fixing those premises up?

A. We did.

Q. Can you tell me when that was?

A. 1938.

Q. What did you do?

A. Remodeled the front.

Q. What did that consist of?

A. Put in a plate glass front, cut a driveway or ramp through the sidewalk, put in a big roll-up door so trucks could go in.

Q. Overhead door?

A. Overhead door, yes. Built a new office, entirely air-conditioned it, painted and cleaned the place all up.

Q. Will you describe the office you built?

A. We built an office in the front, on the east side of the building. We had a floor space of approximately 750 feet, as I recall.

Q. Do you recall the approximate dimensions—width and depth?

A. I think it was about 18 feet wide and 40 feet deep—no, it was more than that—around 40 feet deep or a little more.

Q. Any partitions within the office proper?

252 A. Yes, there was a private room at the rear, lavatories and cloak rooms, light, air-conditioning, insulating.

Q. What kind of light system did you have?

A. We originally started with ordinary lighting fixtures, and afterwards changed those to these new tubular lighting.

Q. Fluorescent?

A. Fluorescent light, yes.

Q. Can you state the cost of those repairs?

Mr. Clay: May all this go in over our general objection?

The Court: It may be so understood.

Mr. Clay: And exception to the court's ruling.

A. We spent \$2,912.63.

Mr. Clay: You are now talking about the repairs made in 1938?

The Witness: That is right.

Mr. Clay: How much was that?

The Witness: \$2,912.63.

By Mr. Smith:

Q. Were you reimbursed for any part of that by the owner?

A. We were.

Q. How much were you reimbursed by the owner?

A. \$1319.52.

Q. That leaves your balance how much that you paid for those improvements?

A. \$1593.11.

253 Q. Are those improvements all an integral part of the building?

A. They are.

Q. Were any part of them removable by you?

A. Yes, we were permitted to remove a little of that.

Q. What did it consist of that you removed?

A. We removed one of the built-in desks that we were told to remove if we wished. We took that out. And we took out the fluorescent lighting, but we had the original fixtures there for them to put back.

Q. Were they left there?

A. They were.

Q. The cost figures you have given me included the original fixtures that they did keep?

A. That is correct.

Q. And not the cost of the fluorescent fixtures?

A. That is correct.

Q. Can you give me an idea of the cost of the desk you removed?

A. I would just have to guess at it. I don't have these figures broken down. It may have been worth forty or fifty dollars. I did have a man come there after night and remove it and remodel it, cut it down for us so we could use it in our new quarters.

Q. The original cost, your opinion is it cost about fifty dollars to build it in the first place?

A. Yes, cost fifty dollars to build it in the first place.

Q. After those improvements were made was that space suitable for your business?

254 A. Yes, it was.

Q. Will you state the factors that enter into the suitability of space for you to use in that business, or the factors that existed in that place that made it suitable for your business?

A. We had an office space that was very accessible to everything in the business district. To start with, we were close to the Western Union, close to the main business part of town, close to the hotels, which, of course, is a factor in a car-lot business.

A lot of the people with whom we deal come to visit us, and if we are centrally located it is an advantage.

As far as the warehouse was concerned, it was ideal. It was heated, centrally located, the materials we carry there are high-priced materials that must be kept away from the weather and exposure. It was so it could be closed up at night. We had storage space for cars and trucks. We had parking space for our customers that came regularly to see us. It was on a paved street.

We had trackage right in front of our building. Could be watched at any time from the office. Railroad trackage.

Q. Available for the receipt of carloads of lumber?

A. That is right.

Q. Where was that trackage?

A. Directly across the street. It was between Pierpont and Third South, but there was an open space in front of our office so one could watch in the front of the building and watch the cars being unloaded, keep an eye on it at any time.

255 Q. Go ahead with the rest of your answer.

A. The building was constructed so we could put as much weight in the building as we wished. The class of merchandise we handle is bulky and heavy. There are times when we had as high as five hundred or six hundred thousand pounds of weight in that building. Of course, to carry that much of a load, a building does have to be properly constructed.

This particular building, we had reinforced it underneath, not only the original construction, which was very heavy in the first place, but additional lines of stringers

and posts put under that to carry that load. And we had no fear of breaking it down, even though we carried a lot of materials on hand and heavy trucks drove into the place to load and unload.

Q. What significance does the fact that you could enclose and heat the warehouse have in your business?

A. Well, it is a very important factor. In handling high-priced building material, such as high-grade flooring, that must be kept thoroughly dry. Lumber will absorb a lot of moisture if left in an open shed or open storage. And then when it is put into a home or residence, after the heat is turned on it, it will shrink and cause a lot of trouble. So a heated warehouse is really an essential thing in taking care of that kind of material.

Q. And one of the advantages of that place, in your business, was it?

256 A. Yes, it was.

Q. I think you have stated that you sometimes had in that building as high as five hundred thousand pounds of weight in merchandise. Is that correct?

A. That is correct.

Q. That would be approximately ten railroad carloads wouldn't it?

A. That is correct.

Q. Do you know how much of a stock you had on hand on November 11, 1942?

A. I do, yes.

Q. How much stock did you have?

Mr. Clay: I object to it as immaterial, if your Honor please.

The Court: The objection may be overruled.

Mr. Clay: Exception.

A. Do you want the weight of the material, or the cost or the value of it?

By Mr. Smith:

Q. Primarily the weight.

A. Approximately 120,000 pounds of material.

Q. You might also state its value.

A. Approximately eight thousand dollars.

Q. By the order to vacate, the order of possession that was issued here, you were given until November 17th, I think, to vacate the back portion of the premises, room 102; were you not?

257 A. I think that is correct.

Q. And until November 20, 1942, in which to vacate the balance of the premises?

A. Yes.

Q. What did you do in compliance with the order to vacate issued by this court?

A. We immediately tried to find new quarters.

Q. Had you previously been advised that you were about to be ousted from these premises?

A. No, I don't recall of having had any information very much in advance of that. I think possibly one day, was all.

Q. You knew the army officers had just come and examined the property, however?

A. Yes.

Q. Will you state what you did in line with the court's order to vacate?

A. We contacted some real estate agents and ran down several leads we had on different buildings that may have been available. We couldn't find anything at all that was suitable for our business.

Q. Did you, yourself, participate in searching for additional quarters?

A. I did.

Q. Did you examine other quarters that were reported to you might be available?

A. I did.

258 Q. Can you tell me approximately how many of them?

A. Four that I know of.

Q. Did you learn of any other place that might be available and suitable for your purpose?

A. There was one building I thought we might be able to get, yes, that would have been suitable.

Q. Did you examine it?

A. I had examined it, yes.

Q. Were you able to get it?

A. No.

Q. So what did you do in reference to your stock of warehouse merchandise?

Mr. Clay: Is that an element of damage in this case?

Mr. Smith: I want to show what he did. I think it is one of the things to be considered—the cost of moving.

A. We tried to dispose of it, as much of it as quickly as we could.

Q. What did you do in that respect?

A. We reduced the price in order to sell part of it.

Q. Do you know how much you sold at reduced prices?

A. I do.

Q. How much?

Mr. Clay: I object to that, if your Honor please—slightly different from my general objection—upon the ground it is immaterial, irrelevant and incompetent.

The Court: Do you claim it can be the basis of an element of damage?

259 Mr. Smith: I claim the jury may consider it as a necessary result of the ouster, that it is one of the things to be considered as to the value of the occupancy.

If we did all that could be done under the circumstances I think that is one of the elements that goes into it, not as a separate element of damage, but as to determining the value of the occupancy.

The Court: I will let you prove it.

The objection will be overruled.

Mr. Clay: Exception.

A. We sold approximately five thousand dollars worth of the material in the warehouse.

By Mr. Smith:

Q. What proportion of your stock was that, if you know?

A. That would be approximately five-eighths of the value that we had there.

Q. How about the weight?

A. That would apply to the weight also.

Q. What was the difference between the market price of that material and the price at which you sold?

Mr. Clay: May my objection go to this? This is really the thing I was objecting to.

The Court: It may be so understood. He is claiming it is an element of damage. I will let him prove it.

A. Approximately fifty per cent under our price.

Q. What did it amount to in dollars and cents?

260 A. About \$750.

Q. What did you do with the balance of your stock?

A. Our neighbors came to our rescue and provided a small storage space.

Q. Where was that?

A. Western Newspaper Union.

Q. Where was the property located?

A. Adjoining us on the west.

Q. How much space did you get there?

A. They cleared a space of approximately four hundred feet, a space ten feet wide, forty feet long.

Q. Is that where you put the rest of the merchandise?

A. That is where we piled the rest of the material.

Q. In placing that material there, was it in an orderly condition to be handled according to warehouse practice?

A. We had to put it in there in a solid block.

Q. What was the cost, if you know, of removing the balance of your warehouse stock to that place?

A. I don't know that I have the exact labor costs on that. We paid the Western Newspaper Union a sum of money to have that place cleared for us. I think that was something like seventeen or eighteen dollars. We had to get their men to stay overtime to do that work.

And then we had our own truck and our men that were moving that stock, but I don't know that I have the exact cost of moving that portion of it.

Q. Are you able to state what it cost to move that portion?

261 Mr. Clay: Is that in your pleading?

Mr. Smith: Yes. Four hundred dollars for the cost of removing that portion of the warehouse stock--

The Witness: No, I think the four hundred dollars was our total moving cost; that is our actual moving cost of everything.

By Mr. Smith:

Q. Linoleum on the floor?

A. Yes. Some painting and insulating.

Q. What did you insulate?

A. The office.

Q. Just insulated the office space?

A. That is correct.

270 Q. And no more?

A. Air-conditioning equipment.

Q. What was that? What did it consist of?

A. Filters and fans and pipe.

Q. Was that moved away by you?

A. It was not.

Q. Is it removable?

A. It is.

Q. So you could have moved it if you wanted to?

A. We were asked to leave it there.

Q. It is not a part of the building? It is not built in?

A. It can be moved, yes.

Q. And what else? Is that practically all?

A. I think that covers it pretty well.

Q. Your total expense for the work in 1938 amounted to \$2912.63, of which your share was \$1593?

A. That is correct.

Q. You moved away a desk. Was the built-in desk part of that?

A. It was a desk used for a railing,—sort of a counter-desk.

Q. Was it comprised in this expense of \$1593?

A. Yes, that is included.

Q. So there was a desk that you moved away?

A. That is correct.

Q. Valued between forty and fifty dollars. What did you value that cooling system at?

A. I think it cost us \$228.

271 Q. And the balance is just your plate glass front and your roll-up door and your ramp and the plumbing and the fixtures. Were the fixtures removable, the light fixtures?

A. Well, I presume they are removable.

Q. Did you take them?

A. We took the fluorescent lights, yes. They were not included in this original estimate, however.

Q. Were they included in the \$1593?

A. No.

Q. The fixtures which are included in the \$1593 were originally in the building, and your fluorescent lights were substituted for the old fixtures?

A. That is correct.

Q. And those you removed?

A. We removed the fluorescent lights; the other fixtures were still there to be installed.

Q. With reference to the lease, did the Metropolitan Life Insurance Company or the Union Trust Company prepare the lease for you? I mean, physically prepared the paper and brought it to your office?

A. The one that wasn't signed?

Q. Yes.

A. Yes, sir, left it in the office in August, yes.

Q. And you didn't sign it in August or September or October, is that right?

A. That is correct.

Q. Were you requested to sign it?

272 A. Yes.

Q. You say Mr. Neilson represented the Metropolitan Life Insurance Company?

A. Yes.

Q. And he left a lease there for you to sign, but didn't specially request you to sign?

A. No, he didn't.

Q. He just said, "Take it or leave it"?

A. No, he didn't say that.

Q. I mean, the result of his action was, he left it there, you could either sign it or not sign it?

A. That was not the understanding.

Q. You say the reason you didn't sign it was because you were expecting the landlord to make some improvements?

A. That is correct.

Q. What improvements?

A. The plaster was falling off the ceiling in the warehouse. We had some that fell off a number of times. It was in bad shape. They were going to put a new ceiling in the warehouse.

Q. Have you ascertained the cost of removing the balance of the warehouse merchandise and the cost of removing your office?

A. Yes.

Q. As to your office, what did you do?

A. We inquired about office space from a number of sources, and finally located two rooms in the Judge Building on Main street.

Q. And did you move to those quarters?

A. We did, yes.

Q. How much space do you have there?

A. Approximately five hundred feet of floor space.

Q. What amount do you pay there?

A. \$77 a month.

Q. Can you describe or state to the jury any difference in the suitability of that place and the place you formerly had in the Terminal building as a place for your office?

A. It is not as satisfactory, because a lot of our customers come to us from out of town, and finding a place to park is quite an item. Going into a building up town is rather difficult for them at times. It was much more convenient for them where we were, to come to see us.

262 We can carry on our car-lot business there, but not as satisfactorily as we could in our old location.

Q. How about the comparative area, the comparative convenience of the area you have?

A. We have about two-thirds the floor space, but we don't have room to get our office equipment in there.

Q. What rent do you pay on that?

A. \$77 a month for the two rooms.

Q. Your company keeps books, doesn't it?

A. Yes.

Q. Have you taken from the books and records of your company your moving cost for your office and your warehouse space with the Western Newspaper Union?

A. I have.

Q. Can you state what that cost was?

Mr. Clay: This covers total cost of your moving, does it?

Mr. Smith: That is correct.

A. The total cost of moving was \$418.14.

Q. Now, in your new office location are you conducting any warehouse business?

A. No.

Q. What has happened to your warehouse business?

A. We don't have any warehouse business.

Mr. Clay: If that is an element of damage included in the cost, it is understood all this goes under our general objection?

263 The Court: Yes.

By Mr. Smith:

Q. What has happened to your warehouse business?

A. We have no warehouse business.

Q. Have you discontinued it?

A. We have.

Q. Why did you discontinue it?

A. To carry on a jobbing business or warehouse business, one must have a place to store and handle the stock, and we have no place to do that.

Q. Because you couldn't get a place?

A. We couldn't get a place.

Q. Would you say there is no place available for the continuation of that business in Salt Lake?

A. Nothing we have been able to locate.

Q. Was your warehouse business a profitable business?

A. It was.

Q. Can you tell me how profitable?

A. I can.

Q. State what the average profits were, and tell me over what period.

A. The warehouse business--

Mr. Clay: I think, if your Honor please, this testimony showing the average profit goes under your ruling as one of the elements of damage.

264 The Court: I have never said so.

Mr. Clay: I object to it as immaterial.

(Discussion.)

The Court: I think I will sustain the objection because this is negative. It stopped your business, that is true. You had to store your property or sell it at a reduced price, you say. That was your own act, and the government has not taken any of your lumber in trade.

I am not going to widen the base of proof at this time. I will sustain the objection.

Mr. Smith: May I make an offer at this time?

The Court: You already made the offer. You have asked what the profits were.

Mr. Smith: I would like to show what his statement would be as to what the profits were and follow it with an offer to prove the value of the business.

The Court: You can make it as a statement and mark it as an exhibit and make it part of the record. We won't have any oral testimony about it in the presence of the jury.

Mr. Smith: The offer is rejected, I take it?

The Court: I say, you can put it on paper if you wish it in the record. But I am not going to have you offer oral testimony of what your testimony is when I have excluded it.

Mr. Smith: I take it the offer also is excluded as evidence?

265 The Court: Oh, yes. It wouldn't be considered by the jury, because they wouldn't know anything about it.

Mr. Smith: May I have an exception?

The Court: But you can get it in the record by putting it on paper.

By Mr. Smith:

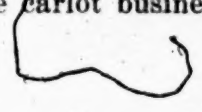
Q. What effect has the discontinuance of your warehouse business had on your jobbing business or carload lots of business?

A. It has affected it quite materially.

Q. In what way?

A. Usually the two businesses are tied in together pretty well,—a carlot business comes to us if we are able to take care of the jobbing business along with it. With a loss of the jobbing business the carlot business has possibly followed the people that can take care of the jobbing end of it, that is, a good part of it.

Q. Is there more competition in the carlot business than in the warehouse business?



A. Yes.

Q. Can you state how much?

Mr. Clay: I object to that as immaterial.

The Court: The objection will be sustained.

By Mr. Smith:

Q. I understand you to say you made a personal canvass and also secured the aid of real estate brokers to locate other places for your warehouse business, is that right?

A. That is right.

266 Q. As a result of that are you familiar with the rental value of premises such as you had in these premises in Salt Lake City on the 11th day of March, 1942—I mean November 11, 1942?

A. I stated there was one building that would—

Q. I say, are you familiar with the rental value?

The Court: Answer yes or no.

A. I found several buildings that were offered to us, but I wasn't particularly interested in the rent because they were not at all satisfactory.

I did state before there was one building in the town I thought we might be able to get.

Q. That doesn't quite answer my question.

In the investigation you made did you become familiar or informed as to the rentals or the rental value of property of the type and kind generally that you had occupied in the old Terminal Building as of November 11, 1942?

A. I don't know that we became particularly familiar with it. I have learned something about what they were asking for rental property.

Q. Do you have an opinion as to the rental value of the premises you had in the Terminal Building on November 11, 1942?

A. I do.

Q. Will you state what that rental value was?

A. \$400 a month.

Q. What was the condition at that time, if you know,

as to the availability generally of industrial property
267 in Salt Lake City?

A. It was very limited.

Q. Was it different than it had been at any time before that you know of?

A. Oh, yes; very much different.

Q. Mr. Adams, you had no segregated rental value for the office that you occupied in the Terminal Building, did you?

A. No.

Q. Was there any segregation made by you as to what the reasonable value of the office was?

A. Yes.

Q. What segregation was made?

A. We figured the office rent at \$55 a month, that part of our rent was \$55 a month.

Q. Has the government offered to pay you anything as compensation for moving from that property?

A. No.

Q. And have not paid you anything?

A. No.

Mr. Smith: You may cross-examine.

Cross Examination.

By Mr. Clay:

Q. The \$115 a month you paid down there, you figured your office portion worth \$55 a month and the remainder, \$65 a month—

A. \$60 a month.

268 The Court: What was the total rent paid?

Mr. Clay: \$115 a month.

Q. You referred to the improvements which you made in 1938 on which you participated to the extend of \$1593 as being an integral part of the building.

What are those improvements, Mr. Adams?

A. The entire front of the building was remodeled.

Q. To what extent? What was done?

A. Plate glass front put in; there were a lot of small windows in there.

Q. Plate glass front. And that remained in the building?

A. That's right.

Q. And do you have an idea of the cost of that?

A. I think I can give you all the exact figures from our books. I don't have them with me. I just took the figure we had set up on our books, the total, was all. I can tell you the items, I think.

Q. I would like to get the items, if you please.

A. There was cutting a roadway or ramp through the sidewalk.

Q. That consisted in breaking the cement on the sidewalk and leveling it up from the gutter into the entrance?

A. That's right.

Q. And laying new cement?

A. That's right.

Q. What else?

A. Then there was a roll-up door—I don't know what they call those—just big garage door, roll-up door.

Q. What else?

269 A. The office building—the entire office building.

Q. How big an office space?

A. Originally we had some space on the west side of the building. It was a make-shift affair we tore out entirely. We left that there and built a new office altogether.

Q. In other words, you took a certain amount of space and built partitions to make an office out of it?

A. That is right.

The Court: When was that?

By Mr. Clay:

Q. 1938 you made an office of one corner of your space. What else did you do?

A. Put in new plumbing, lighting.

Q. Is that the time you put in the fluorescent lights?

A. No, sir.

Q. By lighting you mean you put in new fixtures?

A. That's right.

Q. You didn't rewire the building?

A. Put in new fixtures.

Q. And what else?

A. Linoleum on the floor.

Q. New plaster ceiling?

A. No. We had set aside some material for them to do that work. They had made arrangements for material; a supply of gypsum boards we had set aside needed to do the ceiling.

Q. Describe the ceiling.

A. Gypsum board or plasterboard. They were going to clean and paint the warehouse and paint the front of the building for us.

Q. And *id* needed painting?

273 A. It did. I wouldn't say the brick part, but the frame, the doors and the frame had only had one coat of paint on them. They were to clean that, and paint some old signs out there, and clean the front part of the building down. I think that was the understanding,—that and the warehouse and ceiling and some paint.

Q. And what else?

A. That is all.

Q. They had agreed to do that?

A. They had.

Q. You say the reason you didn't sign the lease was because they had not done that work. Is that right?

A. That is right.

Q. And you weren't going to sign it until the work was done?

A. I think that is right.

Q. Do you think with the need for all the painting and cleaning and the plaster falling off the ceiling, that it was still worth four hundred dollars a month?

A. Maybe we didn't realize at the time we had such a valuable piece of property.

Q. Evidently not. That was submitted to you for signature in August of 1942?

A. That is right.

Q. In your judgment did the value of your premises increase between August and November?

A. Warehouse space was on the increase during
274 that time.

Q. You wouldn't say, if it increased at all,—you wouldn't have an increase between August and November of over five or six per cent?

A. That five or six per cent doesn't seem like much of an increase, the way real estate has jumped.

Q. You are not sure that rentals increased at all in that locality between August and November, are you?

A. I really didn't realize it until—

Q. You don't know of any place where the rent was increased in that locality, do you?

A. No, I don't know as I do.

Q. During the negotiations about the improvements the landlord never at any time requested you to sign this lease?

A. No. We asked for a lease.

Q. After you had it in your possession he never at any time said, "Put your John Henry on there and give it back to us"?

A. You mean the second lease, the one we hadn't signed? No, he didn't ask us to sign it and return it.

Q. Did he indicate to you if you didn't sign it you might have to vacate the premises?

A. No.

Q. Or that the rent would be increased?

A. No.

Q. So far as you know, in the absence of any lease you would have been permitted to continue to pay \$115 a month?

A. Possibly.

Q. So far as you know?

275 A. So far as I know.

Q. Nothing to the contrary had ever been stated to you?

A. No. But I did ask for a lease.

Q. That is true. But they didn't say to you if you didn't sign this lease "We are going to increase the rent"?

A. No, they didn't.

Q. And you are in the Judge building now?

A. Yes.

Q. And you are still in the lumber business, still selling lumber?

A. That is correct.

Q. You don't have any retail business any more?

A. No.

Q. Before, your retail business consisted in what, principally?

A. We didn't consider it as retail business. We were

strictly in the wholesale business. And what you have referred to as retail business we referred to as jobbing business. That is serving the retail lumber yards principally.

Q. For example, somebody wanted a door, you could supply them with it?

A. Not as a rule, a single door. The yards bought maybe fifty or one hundred at a time. But most of the materials we carried were high-priced materials that the yards do not stock in carload lots. A carload of oak flooring, too much for any of the retail yards in this district. That is just one item. They would prefer to pick it up in quantities they need, maybe five or ten thousand feet at a time.
276 that is the class of business we handled.

We also carried boxes. We supplied most of the egg cases through this whole territory. We carry a stock of those, just an emergency situation, possibly a carload of those; items of that kind.

Mr. Clay: I think that is all.

Redirect Examination.

By Mr. Smith:

Q. Mr. Adams, you have requested permission to remove the air-conditioner, haven't you?

A. We didn't remove the conditioner, but they started to make some improvements. In fact, I couldn't get anybody to take it out. But one of the officers here that has something to do with the Engineers called me on the phone and asked me if I would like to sell it.

I told him we would be glad to sell it. He was to let me know very soon if they could use it. I think we set a price on it of two hundred dollars, and he was to call back about that within a week or ten days,—and he has not called. That has been quite some time ago. The air conditioner is still over there, and possibly it could be removed now. I don't know.

Q. Be glad to get it if you can and they don't want it?

A. Yes, I would like to have it.

Q. Were the lights originally placed in the office by you and then replaced with fluorescent lights reinstalled by the government after you left, do you know?

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A. We didn't have them put back in.

Q. Do you know whether the government put them back in?

A. I don't know.

Q. They were just left there available?

A. They were left there.

Q. Can you state the conversation you had with Mr. Neilson about the lease and the signing of it and the improvements to be made, as near as you can, the substance of it, Mr. Adams?

Mr. Clay: I object to it as not redirect.

The Court: On counsel's theory I will let him answer.

By Mr. Smith:

Q. The conversation you had with Mr. Nielson about the lease, as near as you can, what was said by each of you?

A. When Mr. Nielson brought the lease over he said, "I want to get this work done for you, and let's get it done before you sign the lease"—or words to that effect, I don't know whether that was the exact wording or anything like that,—but in reality that is what it meant,—to get the work done, and then we would sign the lease.

He did tell me at one time, he said, "You know, it is much easier to get improvements made when you don't have a lease than to get them after you sign a lease."

Q. Is that all the conversation as near as you can relate it now?

A. The substance of it, Yes.

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Mr. Smith: May I ask another question on direct?

By Mr. Smith:

Q. Did you have a conversation with Mr. Richards when he bought this property?

A. Yes, I did.

Q. Will you relate the substance of that conversation?

A. Mr. Richards and I—

Mr. Clay: I object to it as hearsay so far as the government is concerned.

The Court: He may answer.

Mr. Clay: Exception.

By Mr. Smith:

Q. State the conversation.

A. Mr. Richards came to me and told me—I think he told me he was making arrangements, first, to buy the building, and he would like to have us carry on there where we were, but he did ask that we permit them to open a ramp through the center of our warehouse so the basement could be used for storage space as soon as these cars were stored and everything was cleared away and they could get around to it.

Mr. Clay: I object to that. It doesn't prove anything in this case. Don't see how it could bind the government.

The Court: The objection may be overruled.

Mr. Clay: Exception.

A. (continued:) He was very anxious to have us stay in the building.

279 By Mr. Smith:

Q. Did you tell him what arrangements you had with the Metropolitan Life Insurance Company?

A. I think he understood we had a lease, yes.

Q. Do you know whether you said anything to him about a lease?

A. I don't recall it.

Mr. Smith: That is all.

Recross Examination.

By Mr. Clay:

Q. Was he very anxious to have you stay at the same rental, \$115 a month?

A. He mentioned the fact some adjustment of the rent might have to be made.

Q. Up or down?

A. I don't know.

Q. Did you have some counters in your office there?

A. Yes, we had a counter.

Q. What sort of counter? Ordinary counter like they have in retail stores?

A. One section of it had a wide top on it, cupboard space underneath. Beyond there was just a plain rail.

Q. Did you remove the counter from the building?

A. Yes, we took that out; that was part of the desk I was referring to.

Q. That is the built-in desk?

A. That is correct.

Q. You call it desk instead of counter. How about the overhead door,—is that this folding door you spoke of?

A. Yes.

Q. Did you remove it?

A. Oh, no.

Q. You left it there?

A. Yes.

Q. Was there any adjustment made on your rent for the privilege of putting a new ramp in that building?

A. It was revised upwards after we made the improvements.

Q. I mean the ramp which Mr. Richards requested.

A. No, we hadn't discussed that.

Q. No adjustment was made of your rent?

A. No.

Q. As a result of the putting of a ramp there—what was that put there for, that new ramp which Mr. Richards talked about?

A. So they could use the basement for storing trucks.

Q. In storing trucks, automobile trucks, did they drive across your premises, in through your front door and down into this ramp?

A. That is correct.

Q. Were you paid for that service?

A. No.

Q. Was there a deduction made of your rent for the right to travel across your premises?

A. No.

Q. In other words, Mr. Richards asked you for the privilege of building a ramp in the rear part of your premises to permit the Petty Motor Company to drive automobiles across your premises and down this ramp, is that right?

A. That is right.

Q. In connection with that he said some adjustment would be made of the rent?

A. I don't know that it was put exactly that way. He told me this was a temporary arrangement of some kind there, that there would be no traffic going in and out there. We had plans worked out that we could overcome that ramp so it wouldn't interfere very much with our storage.

I think he was more than anxious to get the cars stored, and as soon as we could get together, work out whatever was necessary or would be agreed to make some changes and fix the building up for us.

Q. To make some adjustment because of this concession which you had granted in permitting them to drive automobiles across your premises?

A. Nothing was said about a concession.

Q. In what connection did he mention the adjustment of the rent?

A. He mentioned that we would get together on the thing when we could.

Q. I mean in connection with the ramp. It was all in one transaction, was it?

A. Nothing was said about making an adjustment for that.

He said, "We want to get this thing here, and let's
282 do it, and talk about it afterwards."

Q. When you say, Mr. Adams, that from your premises you could view the track, you mean just that and no more, is that right? Could you sit in your office and see them back up the railroad car and if your truck went over there you could see them unload stuff out of your car onto your truck? You could see that?

A. That is right.

Q. How far was this track from your building,—300 feet?

A. Possibly; not any more than that.

Q. At any rate, it was far enough away so that lumber from a car had to be loaded onto your truck and hauled over to your place?

A. That is correct.

Q. So you had the same expense of loading and unloading your lumber from the car and hauling it over to your place and unloading it, is that right?

A. It was all put onto the truck and hauled.

Mr. Clay: I think that is all.

Mr. Smith: That is all.

The Court: Who is next?

Mr. Clay: Before we start with your case, Mr. Nelson, may we call Major Sexsmith out of turn as our witness?

Mr. Jones: We have no objection, your Honor.

HAROLD O. SEXSMITH was thereupon called as a witness by and on behalf of the United States (out of turn) and
283 having been first duly sworn herein, testified as follows:

Direct Examination.

By Mr. Clay:

Q. Will you state your name, please, sir?

A. Major Harold O. Sexsmith.

Q. You are connected with the United States Government in what capacity, Major?

A. At present I am post engineer at March Field, California.

Q. March Field is somewhere close to Los Angeles, is it?

A. About nine miles south of Riverside, California.

Q. Major, what connection, if any, did you have with the taking of the Terminal Building in this case—briefly, I mean?

A. I was directed by the commanding general of the new Pacific Division to take necessary steps to remodel the building to make it ready for occupancy by the new Pacific Division which was being moved in here to Salt Lake.

Q. And what did you do in connection with that assignment?

A. I negotiated a contract with a local contractor, a Mr. McKean.

Q. Did you come then to Salt Lake City?

A. I was in Salt Lake City at that time. I was then the chief of the engineering branch of the Mountain Division, which was being discontinued.

Q. In connection with that work did you visit the
284 Terminal Building?

A. Yes, on several occasions.

Q. Before I proceed further along that line, Major, am going to ask you something as to values. For which reason I would like to ask what if any profession you have?

A. In civil life, before I went on active duty with the army I was an architect with an established office in Hollywood, California, at one address for about seventeen years.

Q. How long have you been in the army service?

A. On this tour of duty since November of 1940.

Q. Major, will you state what experience you have had and your qualifications in connection with building lines, in connection with architectural work, the construction of buildings, et cetera?

A. I am a member of most of the professional societies,—the American Institute of Architects, the Allied Architects of California, of Los Angeles, rather; former president of the Los Angeles Architectural Club, and I have had wide experience on all types of construction, large and small.

Q. For instance.

A. The General Hospital in Los Angeles,—as a member of the Allied Architects I assisted in the design of that building. For some nine years I was on the faculty at the University of Washington in architecture. During that time we designed and built several million dollars' worth of class A buildings up there. And in the years I was in California I had a general practice which ran into a million dollars
285 or so every year.

Since coming to the army I have had charge of some twenty-six million dollars' worth of construction work. One job with the Venetian Arsenal storage facilities for arsenal material.

Q. Where is that?

A. Vallejo, California.

I had charge of that job as constructing quartermaster later as area engineer. I had on my staff there some two hundred people. And the total construction personnel ran into several thousand.

Since that time I have been the District Regional Engineer in Oakland in charge of construction in the Bay area.

I was brought into Salt Lake City as chief of the engineering branch of the Mountain Division, and all of the construction which went on throughout this Mountain Division, which included Colorado, Utah and a small part of Wyoming went over my desk.

My experience is general construction experience.

(Government's Exhibits A to N, inclusive, were thereupon marked by the reporter.)

The Court: Any reason why you should object to any of these photographs?

Mr. Jones: As far as we are concerned, your Honor, I would like to find out the dates of the Exhibits I and L.

By Mr. Clay:

Q. I hand you what has been marked as Exhibit E, Major, and ask you to state, if you can, about when that photograph was taken?

A. This photograph was taken the first week in November, certainly before the 10th of November.

Mr. Clay: We offer it in evidence.

Mr. Jones: Who took it, do you know?

The Witness: I am not sure whether it was our photographer from the Mountain Division, or whether it was a photographer who was available from the Grazing Service. I believe it was our man from the Mountain Division office.

The Court: Any objection to it?

Mr. Jones: We have none.

The Witness: This is the District Engineer's mark, on the back.

Mr. Nelson: The evidence of debris there, and so on, was the result of some repair work you were doing on the building at the time?

The Witness: No, I think not.

Mr. Nelson: What about this barricading of the door here? Do you know what that was?

The Witness: That is the side of a stake-body truck that had been put in there from a truck; probably been used in moving out some of the equipment that was upstairs. I think the W. P. A. had an art project up there. It may have been that. I don't know.

Mr. Nelson: You don't know what that is. You don't know what these spots on the floor are?

The Witness: No.

287 By Mr. Clay:

Q. I would like to ask you whether or not Mr. Richards, the former landlord, was doing any repair work or cleaning or painting at the time the government went in?

A. At the time we came there to the building he had one or two men, I think two men, who were brushing down the walls and were make some preliminary—taking some preliminary steps to do some patching and repairing mostly, or, as I say, brushing down the walls and ceilings.

Mr. Nelson: We object to it as not being the best evidence of the condition of the premises at the time the government invited the tenants to vacate.

The Court: He has not said it was, but if it is taken of the building it may be received.

Mr. Clay: And was taken the first week in November.

Q. I hand you what has been marked Exhibit C—

The Court: I thought we were going to leave all that out.

Mr. Clay: I thought so, too.

The Court: Any reason why you should object to these pictures? We can take the balance of the afternoon talking about them.

Mr. Jones: Only two I was interested in; that is I and L, I believe.

The Court: When were all these pictures taken?

288 The Witness: There were two different groups; they were taken within four or five days of each other, anywhere from the 8th to the 11th or 12th of November.

Mr. Jones: Some before and some after the orders to vacate?

The Witness: Yes, sir.

The Court: Do you know which was which?

The Witness: I can identify some of them. I think those taken by our photographer are the ones that were taken first; those which are not marked as District Engineer,—

Mr. Nelson: Same objection.

Mr. Nelson: Some structural work going on, I suppose, these pictures of the basement. Do you know whether that was work done by the Army Engineers?

The Witness: Would you be specific in the one you refer to?

The Court: What I want to do is get them in evidence, then you people can ask all about it you want to.

Mr. Jones: I have only two I want to ask about.

Mr. Jones: Exhibits I and L,—one was taken by your office—I—and the other taken by whom?

The Witness: I was taken by the District Engineer, and L was taken by our photographer from the Mountain Division office.

Mr. Jones: Do you know the dates?

The Witness: Not exactly. Our photographer I believe got in there about I should say the 12th, certainly not later than the 13th. I think the district man was in there previous to that.

By Mr. Clay:

Q. You said the 12th or 13th, you mean November?

A. Of November.

This one marked "I" evidently was taken before Mr. Sorenson moved out, because he is standing in the doorway. He is the real estate man, the tenant who had a space in the lobby.

Q. That is Mr. Sorenson who stands there in the picture?

A. That is right.

Mr. Clay: We offer all of them in evidence.

The Court: How are they marked?

Mr. Clay: A to N, inclusive.

Mr. Nelson: With respect to Exhibits D and E, can you tell me about when those were taken?

The Witness: Not of my own knowledge, I don't know when these were taken.

I recognize these as being photographs of conditions which I found at the time I first saw the basement, which was about the 12th or 13th of November. But as to when they were taken, I don't know.

Mr. Nelson: As to Exhibits N and M, can you tell me when those were taken?

The Witness: Exhibit N was taken by the 13th—they were all taken by that time. And I think M was taken by the same man, so presumably they were both taken on the same day. He came there and took a whole series of 290 photographs at one time.

Mr. Nelson: The 13th of November?

The Witness: By the 13th of November; I don't know the exact day, of course.

Mr. Nelson: We merely offer the objection they are not material or revelant, not properly identified.

Mr. Jones: We object to them as to us on the ground they are immaterial. They don't pretend to have taken pictures of our premises.

The Court: The objection may be overruled.

You are offering it as part of your case?

Mr. Clay: That is right.

Direct Examination (resumed).

By Mr. Clay:

Q. Major, I would like for you to hold these exhibits in your hand while you are testifying. And I will ask you please to state in what condition you found that building

when you first went there, on or before or immediately before the 11th day of November, and particularly with reference to the ceilings, walls, floors, the plumbing, the lighting, the wiring and the availability of natural light, and as you testify, if the photographs in your hand are illustrative of any part of your testimony I wish you would kindly refer to the photograph by the exhibit number on the back, and localize it, and show with reference to what particular tenant or what tenant was located close to the place which you are discussing or concerning which you are testifying.

291 A. Well, in general those sections of the building which were unoccupied reminded me very much of an old haunted house that had not been occupied for many, many years.

The walls were very, very dirty; cobwebs were hanging down; patches of plaster were off the ceilings and walls. And in one place an attic vent had been broken and pigeons had come in and come down through a hole in the ceiling where the plaster was off for several square yards, and it looked like a dovecote or a pigeon loft with all the droppings on the floor.

That was right across the light court from—What was the name of the dress company—from the Brockbank Apparel Company.

In the northwest corner of the building there was a room which had apparently been used for some rug-cleaning establishment; they had built a concrete slab on the floor about twenty-five feet square and five inches thick and water-proofed that slab to make it a table to use water or steam in their cleaning process. They had painted the walls up to the windows and over the windowsills with asphalt paint, and the process which they used was, they had a lot of steam in it, or water, and had caused the window frames and the window sash to disintegrate and practically fall apart. It was completely out of operation. We had to take out the frames and rebuild the sash when we repaired them. We had to tear up this concrete slab, of course.

In the south room on the second floor—

292 Q. If I may interrupt you a minute.

Where this rug establishment was located, with the

concrete slab built in the floor five inches or more above the level of the floor, where was that located with reference to the Brockbank place?

A. There was a corridor and suite of rooms to a light court. That was immediately above the Grocer Printing Company establishment, occupied all the space above the rear portion of their print shop.

Q. Did the condition you have described there have any effect upon the premises of the Grocer Printing Company?

A. I can not be sure that I can answer that correctly, because the ceilings in the Grocer Printing were so black and dirty it was hard to tell whether there had been any leaks from this slab. But the roof above the slab had leaked, and I believe had been fixed,—at least I was told it had been, previous to our coming there.

You spoke of the plumbing—

Q. I interrupted you when you were going to mention the south room.

A. The south room, the ceilings were in terrible shape.

Q. Are those ceilings shown on any of these photographs?

A. Yes, on G and H there are photographs of the ceilings, and also on A.

There had been leaks from the roof which had stained the plaster and caused it to disintegrate in places. There were wide areas of the ceiling where the plaster had
293 broken away from the lath and was just ready to fall down.

When our men would go up there and attempt to patch it, it would break down in large sections. And where it was secured to the lath it was so very dirty and so rough, about the only thing we could do with it outside of tearing off the lath and re-plastering, was to strip the ceiling with wood strips and install on it celotex sheets, which we thought was the quickest and the cheapest and most economical thing we could do.

And the beginning of that work is shown on Photograph A, where the men are stripping the ceiling, preparing to install the celotex. The celotex has a paint coat on it. We saved just the cost of painting of the ceiling.

As to lighting, the electric wiring—

Q. Did you finish about the south room?

A. I could mention the condition of the floors in that room, because we applied generally, not only in the south room, but all through the building with the exception of some of the occupied areas, the floors were very rough, they were either cut or badly worn due to heavy trucking over them. They were splintered, some boards were loose, some boards entirely worn out, in fact, to such extent it would be impossible to sand the floors and refinish to original plan, because we would have to sand so deeply we would have struck down into the tongue and groove of the boards, and we couldn't have gotten a job. So we were obliged to apply, for economy's sake and for speed of use, a thin layer
294 of plywood; that was plywood 4 by 8 sheets, and nailed it down, and it gave us a perfect surface, then we put linoleum on top of that, which gave us a cheap and quick way to repair the floors, and all the floors are repaired that way.

When I say cheap, I mean compared with putting in new floors, that was the cheapest thing we could have done.

Q. Now with reference to the Exhibits A and H, that shows some workmen there in the photograph. Are those workmen of the United States Government?

A. Yes. Those men were hired by our contractor.

Q. Will you state, please, if the condition of the ceiling and wall as shown in those photographs are the conditions as they existed in the building before any work was done?

A. The ceiling in A does show it in the condition except for the fact they are nailing the strips on the ceiling.

In "H" we had torn some plaster off the wall, which shows in this photograph. That was not off the wall when we started. The plaster was so rough and so loose in wide patches that we had to tear it off and replaster, not only in that case, but in many cases throughout the building. We had four plasterers,—I think it was four, or five,—working there for almost two weeks.

Now as to the electric wiring. With the exception of the wiring which had been installed by tenants such as the wearing apparel company, Brockbank, the building was wired with an obsolete type of wiring which I understand is no

longer allowed by the building ordinances here in the
295 city, known as knob and tube wiring. All the switches
and fuse plugs which were located in the first floor
entrance hall under the stairway were of this obsolete type,
a continual source of hazard, mostly due to their age, because
the insulation of the wire had become oxidized.

Q. What do you mean by that?

A. It became hard and brittle and would break off, crack
off in flakes. And representatives of the building department
and fire department came to me when we first started—

Mr. Jones: Object to this as hearsay, what representatives
of the building and fire departments said.

The Witness: I am not going to say that. I was about to
remark that they came to me and asked me—

Mr. Jones: Just a minute.

We object to that, what they came and asked.

The Court: You can leave that out. Go ahead and tell us
what it was they were talking about.

Mr. Jones: Let them testify to it, if the government wants
to bring them in.

A. (continued:) In order to comply with city ordinances
it was necessary—

Mr. Jones: I object to that,—“In order to comply with
city ordinances.” Bring the ordinances in.

The Court: No, we will assume he found out about the
city ordinances.

Mr. Jones: We take an exception, your Honor.

A. (resumed:) In order to comply with city ordi-
296 nances we were obliged in making any changes of elec-
tric wiring to conform with the present standards.
I mean by that, we had to put in either conduits, steel con-
duits, or what is known as armature cable B X.

This entire service panel, this obsolete panel, had to be
torn out of the building and new service brought in at a
different location all through the building, both in the occu-
pied areas, and those which were vacant. There was a great

deal of what we call in the profession "wild-cat wiring." I mean by that, the tenants had added as they saw fit and much of that, most of it was a definite hazard.

Q. Fire hazard?

A. Fire hazard.

Consequently, I suppose ninety per cent, perhaps ninety-five per cent of the wiring in that building as it exists today we installed,—and necessarily so, to get the minimum amount of light which would be required in an average modern office building and for office use. There were no light fixtures in that building—maybe here and there a drop cord with a porcelain socket on, but no lighting fixtures at all with the exception of maybe half a dozen or so in a hall here and there, and of course there were light fixtures in the occupied area, but outside of that there were none.

We had to service some three hundred openings, doors or windows. By that I mean we had to take the windows out and put in new cords. We had to put in new glass, several hundred panes of glass. We had to adjust and right up,—the windows were operated out—and put new hardware on the windows,—and many, many door locks were missing entirely, or doors were entirely off the hinges. I think some of the photographs show that. And many of the doors were gouged where a lock had been removed or they had bored a hole in it, or some object had gone against the door and taken a gouge out of it,—not only out of the doors, but out of the jambs and out of the frame around the doors.

I had, I think it was three carpenters work on that one team for approximately two or three weeks. I think we counted about three hundred doors and windows that had to be serviced in one way or another.

Most of the switch outlets and the ceiling lights in the vacant rooms were missing,—some been pulled out of the rooms and the wires were left hanging there.

The building is heated by steam radiators, the steam being furnished from the Dooly Building. Practically all the radiators in the vacant portion of the building were disconnected,—not all of them, but most of them,—and there was insufficient radiation to meet the minimum standard for the climate

as we find it in Salt Lake City. Consequently we had to add new radiation to the amount of about 1439 square feet.

To describe that in a more intelligible way, that would mean perhaps fifteen average radiators three feet long and three feet high. We had to go out and buy those and
298 put those in new.

The toilet rooms, there were some—I think there was one for men and one for women upstairs, with one or two fixtures in them, for the use of the Brockbank employees, which were in fair condition. They were old style, but they were in good shape.

But the men's toilet room which was on the second floor was not only obsolete, but the fixtures were in an impossible condition. They were filthy. Much of the plumbing underneath was broken. It was the old style lead pipe, and we had to entirely tear out the whole thing and put in new toilets up there on that floor.

The toilets which existed on the main floor and were in use by the tenants were in fair condition. Some of them were perfectly all right, and we re-used those wherever it was possible, and we used the cheapest kind of fixtures we could get by with, all simple, plain fixtures,—nothing fancy about them. And we endeavored in repairing the building to keep the cost of it down just as consistent as could be with putting it in *unable* shape.

Q. Have you covered most of the items, Major, with reference to plumbing and lighting?

A. In the lumber company's space there was a concrete slab laid on top of the wood joist floor. That slab was in rather poor condition. It was wavy and crooked and they laid a new floor over the entire area, to make it usable as an office.

Q. Was that a part of the premises over which
299 vehicles had been driven?

A. Yes, that was used as a driveway for the Gray-Cannon Lumber Company.

I believe the concrete was carried down underneath the mezzanine floor which I think Mr. Adams spoke about. I will bear out his contention about the condition of the ceiling.

there,—the paint hanging from the ceiling in festoons, and it was in very dirty condition. On the mezzanine his office was in nice condition. It was nicely finished off, and in good shape. We had to do very little to that to fix it up.

Q. If you have finished now, I will first call your attention to Exhibit N, and ask you to state briefly—that is facing in what direction?

A. That is a view of the second floor, the north-south corridor.

Q. At the top of the steps?

A. Taken from the top of the stairway opposite the entrance door to the Brockbank Apparel Company.

Q. Then will you give the locations on these other exhibits, referring to them,—for instance, this shows the Brockbank Apparel Company.

A. This is Exhibit M, and it is a view looking from the head of the stairway; that would be west, with the Brockbank corridor wall on the right, and shows the front entrance door and the side doors to their work stations.

Q. Now with reference to the other exhibits,—does
300 Exhibit F show some of the toilets that were taken out?

A. Exhibit F shows the toilets which were removed from the upstairs toilet room I mentioned a moment ago, and also shows the head of the stairway just in front of the Brockbank quarters.

Exhibit G is a picture looking west into a large upstairs room which is on the south which was occupied by the W. P. A. formerly.

Q. Will you briefly identify the other pictures, Major, please?

A. Exhibits K and J are pictures within the rooms right across the light court to the north of the Brockbank Apparel Company.

Exhibit I is a picture taken from the outside entrance door looking up the main stairway.

Q. Looking straight up the stairs?

A. Yes.

Exhibit B is a picture taken in the reverse direction, look-

ing down the stairway to the entrance from the second floor, right in front of the Brockbank.

Q. The two other exhibits are close-up and long-shots of the exterior of the building?

A. That is right.

Q. I would like to ask you about these pictures that will show the basement. Will you tell about what space that purports to show?

301 A. Exhibits B and E are taken in the basement, showing some of the masonry piers and wall through which the ramp was led into the basement from the lumber company.

Q. Is the ramp shown there?

A. Yes, the ramp is shown in this photograph; it is a photograph taken there in the basement looking south through the hole in the wall.

Q. Where is the Gray-Cannon Lumber Company's space with reference to the photographs taken in the basement?

A. It would be just south of it.

Q. Major, is any part of the basement of the Gray-Cannon Lumber Company floors reinforced in any manner?

A. Yes, there are posts under there, as Mr. Adams described.

Q. Any particular reinforcement?

A. Posts and girders to give the floor greater bearing capacity. I will bear him out in his testimony on that, yes.

Q. Was that just under the Gray-Cannon Lumber Company premises?

A. That is right.

Q. Let me direct your attention, Major, to the map that is on the board.

Let me ask you first, there was one office space vacant in the downstairs, is that right?

A. That is right.

Q. And that was facing on South Temple, and just south of the Independent Pneumatic Tool Company?

A. That is correct.

Q. That was a vacant store facing on South Temple?

302 The Court: You mean West Temple?

Mr. Clay: Thank you.

Q. —facing on West Temple?

A. Yes.

Q. What if any vacant space was there on the second floor of the Terminal Building? Will you point out where the vacant space was, Major, if any?

A. With the exception of the W. P. A. quarters and the Brockbank Apparel Company, there was no occupied space. The W P A occupied this large space, but you could hardly find them in it,—that is, one or two people working there with an easel or two. I think there was a man doing a clay sculpture of a horse, and a girl doing a little mural about three feet square. One was over in one corner, and one in another. That was all there was in there.

They had made no attempt to fix up the room or do anything with it, except to move in easels and work there. Just a space to do some work.

Q. Do you happen to know what the size of the space occupied by the W P A was?

A. If I had a ruler I could soon tell you.

Q. Was there anything up there except the Brockbank Apparel Company and the W P A, upstairs?

A. That is all.

Q. Can you tell us or ascertain the figures later of the total floor space upstairs?

A. Approximately twenty-six thousand square feet.

Q. How much of it was occupied? You would have to measure that, wouldn't you?

A. Whatever the Brockbank figure was—I think we have it here somewhere.

Q. 26,000 square feet upstairs.

A. That was approximately the total of the second floor, including halls and toilets and so forth.

Q. Let me ask you, Major, was that building, and particularly the second floor thereof, in a tenantable condition, in your judgment, as you saw it on or about November 11, 1942?

Mr. Jones: We object to the question in that form.

If he wants to find out about the second floor and not include the whole building with the second floor, we have no objection to it.

Mr. Nelson: We object to it as not limited to the part occupied.

The Court: I thought you were limiting it to the second floor.

Mr. Clay: I would like to ask for the entire building, if I may.

The Witness: Do I understand you want me to answer except for the occupied areas what condition it was in?

By Mr. Clay:

Q. Let me ask you this: Do you know what improvements were made on that building by the government?

A. Yes.

Q. And do you have a judgment as to the reasonable value of the improvements made thereon?

Mr. Jones: Put in the cost, we won't object.

Mr. Clay: Have you any objection to this question?

Mr. Jones: To the reasonable value—I don't know that he has demonstrated that he knew the reasonable value at the time.

The Court: Why don't you ask him what it cost to make the improvements? That's the way he would have to figure it, anyway.

Mr. Clay: I think that would be objectionable, because I think the material part is the reasonable value of the improvements.

Mr. Jones: We wouldn't object to telling what they cost.

Mr. Clay: Let me ask my question, will you?

Q. Do you know, Major, the reasonable value of the improvements of that building?

Mr. Jones: We object to that.

The Court: Made by the government?

Mr. Jones: I don't see it makes a bit of difference.

Mr. Clay: My ultimate purpose is to compare the present

condition of the building and what was necessary to be done in order to make it what we might consider tenable.

Mr. Jones: I would like to know what the government did spend on it. I am curious.

305 The Court: I think I will let you ask how much the government spend to get it in shape.

Mr. Clay: I would rather ask him—

Q. Let me ask you this. Do you have a judgment as to the reasonable value of that building at the time the government took it on November 11th?

Mr. Jones: We object to it, as far as my clients are concerned, as immaterial.

Mr. Smith: Same objection.

Mr. Nelson: Same objection.

The Court: If you want to prove by him the basis for its occupancy—he has already proved its condition—testified to it, at least.

I do not see any particular advantage in getting his opinion about the reasonable value of it except as it might apply to the rent, and he may not know anything about that.

Mr. Clay: It occurs to me, if your Honor please, that what was the reasonable value of the Terminal Building at the time we got it, the reasonable value of the improvements made thereon by the government in order to make it fit for their purpose, at least, is material as having some bearing upon the testimony that has been given here as to the last witness. He thought his premises were worth four hundred dollars a month.

306 While it may not be entirely the pivot upon which this lawsuit will turn, I do think it will have some materiality.

The Court: The major has not qualified—has not been here in Salt Lake long enough to have any knowledge of sale values, one way or the other. He does know, probably, how much it cost to make changes and correct the conditions that existed there.

As to going into his opinion as to the value of the building before they were in there, and its value after, when he has not qualified as an expert on values—

Mr. Clay: I thought he had.

The Court: Not as to this property. He may know all about what property was in Los Angeles, where he lives.

Mr. Clay: And other places; and he may know about the value of property here. In other words, my point is—

The Court: Until you qualify him as such a witness, I will sustain the objection.

(Discussion.)

The Court: You have testified here—at least, some of your witnesses have,—as to the rental value of the property they were occupying. One witness said it was worth four hundred dollars.

Mr. Jones: That is Mr. Smith.

The Court: If this witness knows that rents are placed or should be placed upon the real value of property—property that cost half a million dollars, like the building
307 you are talking about over here, and property that was built fifty years ago, it makes a lot of difference in the rental that can be obtained from any tenant.

If you can qualify your witness as to values, so it means anything, I will let him answer.

By Mr. Clay:

Q. Major, I will ask you, how long have you lived in Salt Lake—how long were you here before November?

A. I came here in June. I left in December.

Q. What was your purpose here at that time? Did you have anything to do with selecting buildings for the government in Salt Lake City?

A. No, I must be honest—I don't feel I could qualify to pass on value. I can tell you as an experienced architect what the present-day value of that building would be, what its replacement cost would probably be.

Q. When you say the present-day value, you mean the value as it existed before the improvements were made?

A. Before it was improved, yes. I could only give you that cost as to what it would cost down on the Coast—although I can say this, from my experience here of several months with the Engineers I learned a lot about local costs. Based on that knowledge I could give you an opinion what I think the building was worth at the time.

Q. As of November 11th, before the improvements were made?

A. Yes.

Q. I will ask you what, in your opinion, was the value of that building.

308 Mr. Jones: We object to it.

The Court: I will sustain the objection. It is the property we are talking about here. The building is one thing, but the building and the land it stands on is another and different thing.

Mr. Clay: I mean the property.

The Witness: I am not an appraiser of property in Salt Lake City. I could tell you what the building cost.

By Mr. Clay:

Q. Major, have you arranged for your transportation for tonight?

A. For tomorrow morning.

Q. Before ten o'clock.

A. Ten-fifteen.

Mr. Clay: I think you gentlemen may cross-examine.

Cross Examination.

By Mr. Jones:

Q. Major, I will be as expeditious as I can—

The Court: Let me say, gentlemen, I am not going to stay here very long on cross-examination. You will have to make it short.

Mr. Nelson: I would like the privilege of asking a few questions. The testimony runs primarily to my client, as I see it.

The Court Suppose we give him the right-of-way.

Cross Examination.

By Mr. Nelson:

309 Q. Major, with reference to the wiring you spoke of you said I believe with the exception of the wiring in the Brockbank Apparel Company that it was inadequate?

A. With the exception of the wiring in the occupied rooms, I meant to include the Grocer Printing Company, and the rest of them. They had wiring which was usable.

Q. The Brockbank Apparel also had wiring which was adequate?

A. Yes.

Q. So when you spoke of the inadequate wiring and the oxidized insulation, you were speaking of the unoccupied portion of the premises, weren't you?

A. To a certain extent. Of course the wiring which serves those rooms also was in that condition—when they made any changes in the outlets the same condition existed in the Brockbank as existed in the unoccupied rooms.

Q. But the wiring, as far as you could see, was adequate, wasn't it?

A. Yes.

Q. You say Exhibits J and K were the ones which showed the so-called courtyard on the north of the Brockbank Apparel?

A. I believe those are the rooms. They were in a wing north of the light court.

Q. By the light court you mean, Major, this area along here (indicating)?

A. It would be these rooms (indicating).

Q. Those are the Brockbank Apparel rooms, in red?

A. Yes.

310 Q. Then there is a light court here between the building which let some light through the windows?

A. Yes.

Q. Those Exhibits J and K were unoccupied rooms on the north of that courtyard?

A. Yes.

Q. They had nothing to do with the Brockbank Apparel Company, did they?

A. No, they did not.

Q. This place where the pigeons got through was in that

light court between the Brockbank Apparel and these rooms, J and K?

A. In that same series of rooms at the back, on the west.

Q. You didn't mean to infer, did you, that there was any break-through in the roof of the Brockbank Apparel apartment?

A. Not at all.

Q. No pigeons in there and mussing it up?

A. No.

Q. The condition in some of these exhibits is the condition after you acquired possession of the premises after November 11th, I take it—show your workmen on the job, don't they?

A. Yes.

Q. This one exhibit showing the plumbing fixtures in the hall shows the condition I refer to, Exhibit F, shows the condition after you took possession and began dismantling certain parts of the building?

A. That is correct. Brockbank was still in the 311 building when this occurred.

Q. It was after the time you acquired possession, wasn't it, after the time you ordered the tenants to leave?

A. Yes, I think that is correct.

Q. These plumbing fixtures were placed there by you on the floor of the building.

A. That is right.

Q. Prior to the time you came in those fixtures were installed and operating?

A. They were not operating. They were entirely out of operation. I made it clear there was one or two fixtures in separate toilet rooms not connected with these or adjacent to them that were in operation, that was all.

Q. Including the Brockbank Apparel Company?

A. Across the hall from that, and adjacent to the toilet room where they were removed. They did have, I think, two fixtures in operation.

Q. So far as you know they were adequate for their use?

A. I think so.

Q. Likewise the heat was sufficient for their use, so far as you know?

A. That is correct.

Q. When you speak of the radiation being insufficient, you are speaking from the standpoint of a scientific survey

of the needs of the entire building occupied for your purpose, is that it?

A. That is correct.

Q. As to whether the radiation was sufficient for
312 the tenants who used the building in different parts,
you are not attempting to say, are you?

A. As far as I know, it was adequate for their purpose.

Cross Examination.

By Mr. Jones:

Q. Mr. Nelson has covered most of what I wanted to ask.

You were not attempting, in describing this property, to describe the Galigher premises and the Chicago Flexible Shaft Company and the Pneumatic Tool Company or the Grocer Printing, were you?

A. That pretty nearly describes the Grocer Printing.

Q. The walls and ceilings were very dirty; were they hanging down?

A. There were cracks in the plaster, but they were not hanging down, of course.

Q. Was the toilet inadequate, the wiring poor, and had the looks of a haunted house, all that situation, in the Grocer Printing premises?

A. The whole room was in a very bad state of disrepair so far as cleanliness is concerned.

Q. Looked like a printing shop, did it?

A. I have learned to like that man pretty well. I hate to say anything about the appearance of the inside of his shop.

Q. Have you lived here in the winter and seen our office buildings down town during the winter, with our smoke?

A. I left here just about when that was coming on,
313 December.

Q. You were comparing the interior of the Grocer Printing Company, in the middle of the business district, with your Los Angeles conditions, aren't you?

A. To bring it to a conclusion, the place was in a perfectly usable condition for a printing shop, although it was very dirty.

Q. It wasn't unsanitary—wasn't dangerous?

A. The toilets weren't too hot.

Q. They were adequate, I guess, were they not?

A. Might get some testimony from some of the employees on that. I don't know. They were usable.

Q. You haven't attempted to describe the Grocer Printing Company in telling about the second floor of this building?

A. No.

Q. Your testimony has not been directed to it?

A. Except in so far as I have made these remarks just now.

Q. I am speaking about your testimony generally, describing these pictures—it is not describing the Grocer Printing Company?

A. That is correct.

Q. Nor the Galigher Company, nor the Chicago Flexible Shaft Company, nor the Pneumatic Tool Company?

A. That is correct. We had to go into all these spaces and clean them up and put new ceilings on them.

Q. That is upstairs?

A. That is downstairs, except the stamp metal ceiling of the Galigher Company.

314 Q. Didn't the Wiggs people have a stamp metal ceiling, too?

A. I think a portion of it was.

Q. The whole thing?

A. But we had to clean up everything in there.

Q. It didn't suit you?

A. It was pretty dirty, with the exception of the Galigher premises. They were in a different condition. I think the Flexible Shaft premises were pretty clean.

Q. I say, to suit your purposes you went and changed them, didn't you?

A. That is right. We had to.

Q. They weren't suitable for your purposes?

A. That is right.

Q. You had an entirely different use for them than they were being used for?

A. It was office space similar to theirs.

Q. Did you use it for store rooms, selling machinery and parts and appliances?

A. The back portion of their space was used for that purpose, but the front was office space, and almost the entire area of the Galigher premises was offices.

Q. Did you leave it the way it was?

A. Substantially, except we put in partitions to divide it into floor space. We gave it a coat of paint and put in some additional partitions, that is all.

Q. I would like to know what it cost to renovate that building, and what the government spent on it, if you know?

A. I don't know the exact figure, because I was
315 transferred elsewhere just previous to the completion of it. But I know my estimate was fifty-six thousand dollars.

Q. Do you know how much had been spent when you left?

A. Something less than that—about fifty thousand dollars.

Q. And do you have any information as to the total amount?

A. I have been told that the final figure will be more than that.

Q. What?

A. I don't know.

Q. What have you been told it will be?

A. I haven't been told the exact amount, but that it will be in excess of fifty-six thousand dollars.

Q. Would it be \$78,050?

A. I wouldn't know.

Q. You have no pictures of any of the occupied premises as they were on November 11th?

A. I haven't seen them, no.

Q. Have you any, Major?

A. No, I haven't.

Q. Why didn't you take any pictures of those, and bring those here?

A. As I say, I was transferred before the building was quite completed, and the pictures wouldn't be taken until after they were finished.

Q. Those pictures were not taken after the building was finished?

A. You are asking me if I had any pictures of the
316 completed building.

Q. I said of the occupied portion of the building at the time the army took it over.

A. I don't believe I know why we didn't, except that the tenants were in there and we didn't want to disturb them.

Q. Why did you bring in just the worst looking things you could take pictures of, and not the other?

A. You will have to ask the United States Attorney that question. I didn't bring them in.

Cross Examination

By Mr. Romney:

Q. Major, referring to Exhibit D, which purports to be a picture of a part of the basement, could you state the height of the ceiling in the basement?

A. About fourteen feet, I should say, from the floor.

Q. This expenditure which you have referred to that the government has made, was any portion of that made in the basement?

A. None at all.

Q. The basement, then, today is in the same condition, so far as you know, as it was on November 11th last?

A. That is correct.

Q. The basement is open, one large area, isn't it?

A. There are some cross bearing walls, but there are openings through those. The only change we made in the basement was to provide service to our radiators or new wiring to the floor above.

Q. Is the basement now being used by the gov-
317 ernment?

A. There is a carpenter shop and small storage space, I believe, there.

Q. Occupying only a relatively small part of the basement?

A. That is right.

The Court: I have not marked your pictures as having been received.

Mr. Clay: I offered them, your Honor. I think you ruled that they be received.

Mr. Jones: I objected to them. I don't know whether your Honor ever ruled on them—as far as we are concerned.

Mr. Clay: Your Honor said they could be received.

Mr. Jones: —as immaterial.

The Court: Do you offer them?

Mr. Clay: Yes.

Mr. Jones: We object to them as immaterial as far as we are concerned.

Mr. Nelson: We object also as immaterial.

The Court: The objection may be overruled. They may be received.

Redirect Examination.

By Mr. Clay:

Q. You were asked about producing the worst pictures. Do you consider the picture of the Galigher Company the worst picture you could have taken of it?

A. I think that it is a very fair picture of the exterior of the Galigher Company.

Q. What do you say about Exhibit L. showing the entrance to the building?

A. That is substantially the condition the building was in when we started operations. Mr. Richards had a painting contractor painting the exterior before we started our work, and this shows his scaffold there, working on the exterior.

Q. You have been asked as to the cost of the improvements made on that building, Major. Have you time to briefly tell what was done in the building to make up this fifty-odd thousand dollars?

The Court: I advise you, if you want to let him get away tonight, that you do not insist on having him answer that question and being cross-examined on it.

Mr. Clay: If you can do it in a couple of minutes, I would like it.

A. I partially covered that in describing what we did.

We provided about thirty thousand square feet of this plywood on the floors, and linoleum in a like amount.

We put light fixtures throughout the entire building.

We refinished all the hardware on all the doors, that is, locks and knobs and latches and in many cases hinges.

We painted the entire interior.

We put in ceilings upstairs and down with the exception of the steel metal ceiling in the Galigher Company, and so forth.

We installed several additional windows, to get adequate light in the Grocer Printing Company area.

We put in fourteen hundred square feet of radiation, which I mentioned.

We put in a storm revolving door, a second-hand one which we bought. We rebuilt the front steps, because they were in such a dilapidated condition we were afraid people might fall down.

That is substantially it.

Recross Examination.

(By Mr. Jones:)

Q. You felt that this building before it was suitable for occupancy, that you were justified in making these large expenditures of money?

A. Yes, sir.

Q. And that they were necessary, in order for you to occupy the building you had to make those expenditures?

The Court: Don't say "you".

By Mr. Jones:

Q. The Army Engineers.

A. To make the building usable or suitable for any tenant with an office occupancy problem it would have been necessary to do what we did.

Q. An expenditure in excess of fifty thousand dollars was perfectly reasonable and justified?

A. Yes, sir, I believe that was.

Q. This property was in pretty bad shape?

320 A. Yes, it was.

Q. Why did you take that property, then?

A. I didn't take that property. My job was to remodel what was given to me to be remodeled.

Q. Were you in on the selection of it?

A. No, sir.

Q. You don't know why they picked this property?

A. Only on hearsay.

Q. What was it?

A. That it was the only available space in Salt Lake City, after a very thorough search, which would meet our

problem and at the same time disturb the fewest possible tenants.

Q. Then you realize if that condition existed for you it would exist if you threw these tenants out?

A. We were disturbing the fewest number of tenants we could find anywhere in Salt Lake City.

Recross Examination.

(By Mr. Nelson:)

Q. Major, you say you fixed that building up for the use of office space—that was the primary purpose?

A. Yes.

Q. If you had intended to fix it for use as a factory or wholesale distributing establishment, you probably would not have done it in the same way you did for office space for the army?

A. That is correct. We would have left out all partitions, office partitions.

Q. Likewise would not have had to have quite
321 the fineness and finish it did for the purpose for which you intended to use it, isn't that true?

A. "Fineness" is a poor designation. We didn't spend a dime more than we had to, to clean it up and make it usable. If it had been a factory it would have been reasonable to paint the walls and repair the floors, at least, and put in new lights.

Q. Do you think you need the same kind of smooth linoleum floor covering on plywood for a factory as for an office space?

A. No, we could have put in wooden floors at about the same price, but it would have taken longer to do it.

Q. Calling your attention to Exhibit I, can you show me from that photograph wherein those stairs leading upstairs were dilapidated?

A. The covering of the stair treads was worn out. The metal nosings were loose and rattled and were a hazard to traffic on the stairs.

Q. Does that show in the photograph?

A. Of course you can not show the fact that they were loose.

Q. That is all that was wrong with the stairs, is it?

A. Outside of the necessity for varnishing them and cleaning them up; we went in underneath and blocked them up because they squeaked and rattled.

Q. They didn't have to be rebuilt?

A. No, just nosing and new linoleum. They were
322 very steep, but we didn't change that.

Q. The railing and everything is quite satisfactory there, apparently?

A. Yes.

Q. So you don't mean to imply they were really dilapidated—they needed a little repair, isn't that true?

A. I guess your definition of "dilapidated" is different from mine.

(At this point the further hearing of said cause was adjourned to Thursday, April 1, 1943, at ten o'clock a. m.)

Salt Lake City, Utah,

Thursday, April 1, 1943: 10:00 A. M.

323 (Pursuant to adjournment, the further hearing of said cause was resumed, and the following proceedings were had.)

MEL J. BROCKBANK, was thereupon called as a witness by and on behalf of the defendants, and having been first duly sworn herein, testified as follows:

Direct Examination.

(By Mr. Nelson:)

Q. State your name, please.

A. Mel. J. Brockbank.

Q. Where do you reside?

A. Salt Lake City.

Q. How long have you resided in Salt Lake City?

A. Since 1928.

Q. Mr. Brockbank, are you and were you or about November 11, 1942, doing business as Brockbank Apparel Company?

A. Yes.

Q. You are the sole owner of that business?

A. Yes.

Q. How long have you been in business as such?

A. We started in 1928. Fourteen years.

Q. At what location?

A. 222 South West Temple.

Q. Is that this Terminal Building?

324 A. Yes.

Q. The same premises you occupied on or about November 11, 1942?

A. We occupied when we first went in the building less space, in a different location.

Q. That is, in the same building but in different rooms?

A. Yes.

Q. How long had you been in these particular rooms that you occupied when you were evicted?

A. About ten years.

Q. What is the nature of your business?

A. We manufacture ladies' ready-to-wear, which includes dresses, blouses, skirts and uniforms, selling that merchandise to retail stores, institutions such as hospitals and commercial industries.

Q. Have regular customers as a rule, do you, that repeat?

A. Yes.

Q. And do you have any agents on the road?

A. Yes.

Q. How many?

A. Just one.

Q. Practically all your customers come to your place of business, from past experience?

Mr. Clay: I object to it as leading, if your Honor please.

The Court: He may answer.

A. Well, some do and some do not. Some we never see.

325 By Mr. Nelson:

Q. How do they order?

A. Order by mail and through salesmen that call.

Q. Can you give us the approximate volume annually of your business?

A. Between forty and forty-five thousand dollars per year.

Q. In your establishment you say you manufacture the dresses as well as sell them?

A. Yes.

Q. And not only dresses, but other wearing apparel for ladies?

A. Yes.

Q. What kind of equipment do you have there for the purpose of manufacturing?

A. We have the regular what we call commercial industrial sewing machines, cutting machines.

Q. How many of them?

A. About nineteen.

Q. Anything else? —

A. We have a cutting table.

Q. What other equipment did you have in the premises?

A. We had dress cases, glass cases.

Q. How many?

A. We had two dress racks or dress cases, one glass case, office equipment, three desks, files, one safe and various small items.

Q. How large were these articles of equipment and furniture?

A. Well, the weight, do you want?

Q. Approximately. Just give us an idea about the size and weight of them.

A. We had two dress cases sixteen feet by eighteen inches wide, a glass case which was about ten feet long by eighteen inches wide, one desk three feet wide by four feet long, one safe weighing about two ton, motor stands and machines weighing about one hundred to a hundred and twenty-five pounds each, one cutting table thirty-six feet long, forty-eight inches wide which was in one piece, and various other smaller equipment.

Q. Did you give the height of the dress cases?

A. The height of the dress cases was about five and a half feet high.

Q. I will ask you whether or not it was necessary for you to move and whether you did move all this equipment and furniture to your new location when you left the premises in the Terminal Building?

A. Yes.

Q. Mr. Brockbank, will you describe the premises you occupied in the Terminal Building and you might if you care to examine Exhibit 1, the map on the board.

Calling your attention to that map or drawing, the upper part I take it is the ground floor, isn't it, I imagine—a picture of the ground floor of the premises?

A. Yes.

Q. And the lower part is a drawing of the second
327 story of the building, isn't it?

A. Yes.

Q. Now, which is the West Temple side of the building?

A. The lower.

Q. The bottom part of this second floor—where are the stairs? Will you point to where the stairs come up to the second floor?

A. They come into a door here (indicating), go over with a jog and go up straight.

Q. Where is your door here?

A. It is here (indicating).

Q. Right in front of the staircase?

A. And about ten feet from the top of the stairway.

Q. Is it directly in front of the staircase?

A. Yes.

Q. Will you point on the drawing to the premises you occupied?

A. We occupied all the red space.

Q. That is the space marked with red diagonal lines and marked "Brockbank Apparel Company"?

A. Yes, sir. We occupied two rooms across the hall at the rear of the corridor or hallway.

Q. That is to the south?

A. To the south.

Q. This hallway is right to the rear, this is a room here, and this is a room here which I think was about thirty-by eighteen—that is, eighteen feet across, thirty feet deep?

A. Yes.

328 Q. That is the two rooms together?

A. Yes.

Q. Have you the dimensions of the red-colored space there?

A. Yes.

Q. Will you give us the dimensions and square footage?

A. The dimensions of this room here—

Q. You are referring to the long space in red?

A. Yes. That is about 105 feet by 18 feet. This space here (indicating) is 18 wide by about 30 long.

Q. Those are the two rooms on the south side?

A. Right here (indicating), yes.

Q. What other space did you have?

A. We occupied this small vault which was in the rear of the colored portion which is about 10 feet by 10 feet. This is the only opening into the vault, through this room, so we used it.

Q. And what was the nature of that vault, the equipment of it?

A. It was fireproof, had cement walls and ceiling. It had a steel door or iron door with a combination lock.

Q. For what purpose was the vault used by you?

A. Used mainly for filing of office records and supplies.

Q. That ten feet by ten feet space there, approximately one hundred square feet, was in addition to the square footage you mentioned as to the part in red and the part on the other side of the hall, wasn't it?

A. Yes.

Q. Can you give us the total area of all the space you occupied, including the vault?

A. The total area would be about 2526 feet. I don't know the definite area of the vault, but I should judge about ten foot by ten foot.

Q. On that basis you would say 2526 square feet?

A. We had 1890, and a long space 540 here, and the vault, which would be about 2526 feet.

Q. Were there any partitions in any of these rooms—partitions between the rooms?

A. This space here (indicating) had two partitions, that is, the long space. This is the one, here (indicating). And the one here—this space (indicating) was one room.

Q. The entire space was designated as what rooms?

A. No. 210, 235, 236, 237, 238, 239, 240, 241 and 242.

Q. Where were 241 and 242?

A. They were the rooms in this area across from the red space or the space marked with a red line.

Q. The vault is not numbered, is it?

A. No.

Q. Will you give the directions—which is north on this map?

A. This is north on the map (indicating).

Q. On the right-hand side as you face the map is north, is that right?

A. Yes.

Q. Calling your attention to this space next to the larger space on the north, what was that?

330 A. That was an open court with window lights for the light for the people using the bottom space, and then the rest was a flat roof.

Q. Where was the flat roof—what was the elevation of that from the standpoint of your premises?

A. About the same floor elevation as the floor we occupied.

Q. That is, the flat roof was about the same elevation as your floor?

A. Yes.

Q. Were there windows along the north side of this space here (indicating)?

A. Yes.

Q. And how many windows?

A. I wouldn't know offhand. The window would be about thirty inches wide, and windows all along the wall, except there was a doorway back about eight feet from the rear, and then a window beyond that; it had a continual row of windows.

Q. I will ask you whether you got the light of day through those windows at all times during the daytime?

A. Yes.

Q. Was that natural light facility of any value to you in your business?

A. Our operators of course work on sewing machines where good light is very essential, and the best light for the operation of sewing machines is a north light—no glare from the sun. It was an ideal light situation.

331 Q. Could you operate there in that establishment during the daytime hours without the use of artificial light where these windows were?

A. We used some artificial light in the winter months.

Q. Other than the winter months how did you fare?

A. Most of the daytime from eight to 4:45, during that time they used the natural light coming in from the windows.

Q. Calling your attention to the front rooms of this other space, the larger space, will you indicate what you used those rooms for?

A. This room (indicating) was used as an office.

Q. That is the front room?

A. Yes.

And the next room west was used as a sample room.

Q. What about the rest of that space?

A. The space beyond here was used for a long cutting table and machines in units of 1 to 4.

Q. Your factory workers worked at those machines?

A. Yes.

Q. What about the rooms across the hall to the south and to the rear of the building there?

A. The room at the rear was used for a store room for tools and surplus materials and supplies.

The next room was used for ladies' lunch room or rest room, where they would go during their periods off, which we allow them twice a day.

Q. And was the rest room of satisfactory use to you in that regard?

332 A. Very satisfactory. It was large and well ventilated, had windows on the side, and was very useful for that purpose.

Q. What is in this space adjoining these two rooms on the south side?

A. The space to the south of the two rooms was an open court with practically the same setup as the one on the north of our long portion where we occupied—with windows along the walls.

Mr. Nelson: You may resume the stand, if you will.

Q. How many employees do you have, Mr. Brockbank?

A. It varies—between seventeen and twenty.

Q. And were they men or women or both?

A. Mostly women. Two men, and the balance were women.

Q. I will ask you whether or not the locality in which

you were situated in the Terminal building had any particular or peculiar adaptability to your uses in your business?

A. We were located at that address which was in close proximity to other wholesale ready-to-wear businesses; right on Second South, two-thirds of the way down the block is the Patrick Dry Goods; across the street the Pyke manufacturer, who sell many of the same accounts that we do.

Q. Both of those firms sell similar accounts to yours, and did the same type of business?

A. They do a different type of business. They sell many of the same items we sell.

Q. What type of business does the Patrick Dry Goods do?

A. Wholesale notions and piece goods and ready-to-wear business.

Q. And manufacture, too?

A. No, just jobbing.

Q. What about the other firm?

A. The Pyke Manufacturing manufacture their own merchandise for sale largely, and make sport items for ladies, blouses and slacks.

Q. You considered it of considerable advantage to you to be in a locality where this type of firms were situated, did you?

A. We feel as though it is better to be near the same location as other people selling the same stores and having the same outlets we do. It is convenient. When they call on one, they call on probably three or four, if they are in a close distance.

Q. How much rent were you paying on these premises at the time you were ordered to vacate?

A. We were paying \$22.50 a month.

Q. For the entire premises you have described?

A. Yes.

Q. And how long had you been paying that amount of rent?

A. I wouldn't know definitely, but I think about ten years.

Q. Did you have any written lease?

A. No.

Q. From whom were you renting at the time the government served its notice to vacate the premises?

A. We paid our rent to the Union Trust Company.

334 Q. Who was the owner of the building at that time?

A. I understood the Metropolitan Life Insurance Company—November 11th, you mean?

Q. Yes.

A. I understood it was owned by Mr. Richards, November 11th.

Q. Had you received any indication at all from the owner of the premises or from any one else that you would be required to vacate the premises?

Mr. Clay: I object to it as immaterial, if your Honor please.

The Court: He may answer.

Mr. Clay: Exception.

A. No.

Q. So far as you knew, you were at liberty to remain there as long as you wanted to, were you?

Mr. Clay: Same objection, if your Honor please.

The Court: Same ruling.

Mr. Clay: Exception.

A. Yes.

Q. What did your rental include for those premises?

A. Included the space occupied, watchman service, water and janitorial service in the hallway and toilet rooms.

Q. What about heat?

A. And heat.

Q. Now I will ask you to state what the facilities were in the building and whether they were satisfactory and ample for your requirements in these premises, the Terminal Building?

335 A. Yes, they were, we thought, quite ideal for our business.

Q. Were the floors suitable to your use?

A. Yes.

Q. What about the lighting facilities?

A. They were ample. We had put in fluorescent lights. We also had attached to each machine a single individual light for the operator to turn on and off at their desire.

The heat was sufficient. And we had ample space for the business that we do, and for our equipment.

Q. Ventilation satisfactory?

A. Ventilation was very good.

Q. What would you say as to the plumbing and toilet fixtures?

A. They were in good condition. They were used by our women without complaint, and they were kept clean, and they were in good condition.

Q. Satisfactory to your needs, were they?

A. Yes.

Mr. Nelson: If your Honor please, at this time I should like to ask Mr. Clay whether or not he has some other photographs, or whether the government has, of the premises?

Mr. Clay: I haven't. I don't know how many the government has.

Mr. Nelson: I am informed others were taken. I wonder if you would make inquiry and attempt to get them for us, Mr. Clay?

Mr. Clay: Of whom shall I inquire?

Mr. Nelson: Your clients, whoever they may be. The real estate department of the U. S. Engineers, I take it.

336 Mr. Clay: Mr. Stevens says no. May the record show he does not know of any.

I saw five or six or more of each one of those, Mr. Nelson.

Mr. Nelson: We understand there are other photographs in your possession, or were in the possession of the Army Engineers. We would like to have them, if they are.

The Court: Well, they don't have to produce them.

Mr. Nelson: We just make inquiry, your Honor. We would like to get them if we could.

The Court: You have had ample opportunity to take all the photographs you wanted.

By Mr. Nelson:

Q. Mr. Brockbank, I show you Exhibit N, and ask you

to look at it and state whether or not that shows any part of your premises?

Mr. Clay: May I interrupt a moment?

In connection with Mr. Stevens' statement that he has no other photographs, he stated that they do have some photographs taken from time to time as the work progresses in the reconstruction work that was being done by the government, but they would not show the condition of the building as of the date we took it.

Mr. Nelson: Thank you, Mr. Clay.

Q. Will you state whether Exhibit N shows any part of the premises you occupied in the Terminal Building?

337 A. No.

Q. Do you know where that is, that place that picture shows?

A. I think it is on the north part of the building.

Q. The unoccupied part?

A. Yes.

Q. I show you Exhibit K, and ask you whether that shows any part of the premises you occupied?

A. No.

Q. Is that also a part of the unoccupied part of the premises?

A. I presume it was.

Q. Likewise Exhibit J?

A. Looks like the unoccupied part.

Q. No part of the premises you occupied, in any event?

A. No.

Q. Showing you, Mr. Brockbank, Exhibit B, that is looking downstairs of the stairs leading to your premises, wasn't it?

A. Yes.

Q. You notice the debris on the floor and the stairs there. Will you indicate whether that was the usual condition of those premises during the time you occupied it?

A. No, it would not be.

Mr. Clay: We don't contend it was.

Mr. Nelson: I am happy to hear that, Mr. Clay. I thought maybe that was the intention.

Mr. Clay: No.

By Mr. Nelson:

Q. Do you know what those splatterings on the floor were at the time?

338 A. I think they might be lime or cement—probably lime.

Q. Do you know whether there was some construction or renovating work going on at the time the photograph was taken?

A. I wouldn't know. I didn't see them take the photograph.

Q. What about this structural affair by the door? Do you know what that was?

A. Just a few boards nailed together to protect a radiator, or else I wouldn't know what it was for.

Q. Was that in there as a customary thing?

A. No.

Q. This condition you would say was merely temporary at the time some work was going on in the premises?

A. Yes.

Q. I will ask you whether or not the premises you occupied in general were kept in good condition during the time you occupied them?

A. Yes.

Q. Calling your attention to Exhibit F, what part of the premises does that show?

A. That is the hallway leading to the south part of the building, I think.

Q. Upstairs or down?

A. Upstairs.

Q. You notice a good deal of litter and debris along the hallway. Was any of that stuff there during the time you occupied the premises?

339 A. Not before November 11th, not before the reconstruction was being done.

(Last question and answer read.)

Q. Do you know who brought that stuff there?

A. That was taken from the toilet rooms on the left, I think—the large toilet room, which wasn't being used.

Q. Not the toilet rooms you were using in your place of business?

A. No.

Q. Who placed the stuff in the hall there?

A. I presume the workmen did.

Q. The workmen for whom?

A. The people who were reconstructing the building or remodeling it.

Q. For the government?

A. For the government.

Q. You refer to all this stuff on both sides of the hall, do you not?

A. Yes.

Q. Was that hall as a rule kept free and clean of debris and material during the time you occupied it?

A. We didn't use that hall, so we didn't know. We didn't use the hall.

Q. You didn't go through that hall?

A. No.

Q. That wasn't visible to your eyes during the time you were occupying the rooms?

340 A. It was closed and used by the W P A at that time, and locked.

Q. Likewise call your attention to Exhibit M, and ask you if those ladders and things in the hall were there as a customary thing?

A. No.

Q. Do you know who placed those there?

A. I presume the workmen who were painting.

Q. Likewise Exhibit L, will you indicate whether this material on the outside of the building was there as a usual thing?

A. No.

Q. Do you know whose material that was?

A. I presume it was the painters' who were painting the outside of the building at the time of the picture.

Q. As far as you are concerned, I will ask you whether or not the premises themselves were in good, clean condition, the premises you occupied and used, both for your factory purposes and for your means of ingress and egress during all the time you occupied it?

A. Yes, our premises were kept clean by a janitor every day, and the toilet rooms and the halls were cleaned about twice a week, but the toilets were kept clean each day.

Q. Now I take it you were notified on the 11th of November, 1942, to vacate these premises on the part of the government, were you not?

341. A. Yes.

Q. When did you vacate?

A. About November 20th.

Q. About nine days later?

A. Yes.

Q. You had nine days to vacate?

A. The order was the 20th of November to be vacated.

Q. During that period of time what efforts did you make to find a new suitable location for your business?

A. We called the real estate people, Woodbury Real Estate and Walker Bank Real Estate, Union Trust and several real estate people; I spent many hours looking for a location suitable, going from Second West to Second East, and North Temple to about Ninth South.

Q. Were you able to find any suitable location for your business?

A. No, only what we did get, 50 West First South, which was the nearest to what we wanted.

Q. Would you say the premises at that location were the nearest to those which would suit your needs that you could find?

A. Yes.

Q. Will you describe those premises?

A. It is in a three-story building, space about 19 feet by 104 feet long, one room, with a basement under.

Q. The premises which you took over then were the ground floor?

342. A. Yes.

Q. And the basement?

A. Yes.

Q. Calling your attention to the ground floor, that was all one room, you say—no partitions?

A. Yes.

Q. What was the nature of the premises from the standpoint of natural light?

A. It is natural light, the front and the rear end of the room.

Q. Anything along the sides?

A. No windows on either side.

Q. You say it is nineteen by what?

A. 19 by 104.

Q. On each end is the light, no lights on either side along the sides?

A. That is right.

Q. What did you have to do to that place to make it suitable for your uses?

A. We rented from the Clayton Investment; they endeavored to get it ready for occupancy about the 20th of November, but because of labor shortage, and material, they were unable to do so. So we moved in anyway, and piled our equipment and merchandise in the middle of the floor. The paper hangers were still in there when we moved in, and the carpenters and painters were working when we moved in.

Q. I will ask you whether you put any partitions in there or found it necessary to, for your purposes?

343 A. We didn't put in partitions. We put a dressing room on the main floor. We partitioned a small space off in the basement for a ladies' rest room, for their lunch room and their time off, and moved in the equipment we had in the other location for their use.

Q. Calling your attention to that so-called dressing room, is it satisfactory for that purpose?

A. No.

Q. What's the matter with it?

A. No ventilation in the basement.

Q. Any light down there?

A. The ladies wouldn't use it. There is no light except artificial light. The building was occupied by a fish and poultry market before we occupied it, and it had to be cleaned from top to bottom, and we just did everything we could to remove the stench and odor and filth that was in there.

Q. What did you do in the way of cleaning there?

A. The Clayton Investment papered it for us, and they fixed the floor, tore out a cooler, put in new floor and built a ladies' toilet on the main floor. They had one before which was madequate, and they remodeled that, also put one in the basement for the men's use.

We couldn't get the odor out, so we had to sand the floors, because the odor wouldn't come out, anything we could find that would penetrate it.

Q. That was the fishy odor, the odor from the fish market you are referring to?

344 A. Yes, sir.

Q. What about your light fixtures—anything necessary to be done with them?

A. We removed all our fluorescent lights from the other location, had electricians put in new wiring and installed them. We also installed connections for our motors, ran our lines.

Q. I will ask you whether you suffered any loss of supplies or equipment by reason of the move?

A. Not knowingly.

Q. Any stationery?

A. We had 2500 letters and envelopes printed with the old address just three weeks before we moved.

Q. What did you do with those?

A. We had them restamped.

Q. Rubber-stamped to change the address?

A. Yes, sir.

(A document was thereupon marked by the reporter Exhibit 7 for identification.)

Q. Mr. Brockbank, I show you what is marked for identification Exhibit 7. I will ask you if you have another copy of that exhibit?

A. Yes.

Q. Will you let me have it for reference, please.

Will you examine Exhibit 7, and state whether or not it is a statement of the items which purport to appear thereon in reference to the expense of moving which you have been put to and also the cost of your water bill at the
345 new location and the difference in rent between the rent you were paying and the rent you are now required to pay?

A. Yes, sir, that is the case.

Q. Referring to the items, near the top of the page you have listed several people under "Labor", and the items and amounts of that are listed. Will you indicate what that labor was for?

A. Mr. Anderson was for his work helping to move machines and helping to carry and unload the merchandise and equipment, installation of ladies' rest room, white washing the walls, cleaning up the basement.

Mr. Hales was also doing similar work, work on the floors and the two boys did work on cleaning, helping move the fixtures and merchandise.

The ladies below were employees who spent the hours mentioned on packing merchandise so we could carry it over to the new location, and sorting the papers and in general putting the merchandise in condition to move.

Q. The four ladies, Mrs. Hardcastle, Miss Adams, Mrs. Hurley and Miss Jeppsen, are all your regular employees?

A. Yes.

Q. And the time you have charged on this list was their time spent in the actual moving operations necessary to move your business?

A. Yes, sir.

Q. The four men you mentioned, were they your employees?

346 A. They were all except the three of them.

Q. Only four there.

A. One below there, Mr. Jeppson, he was a regular employee. Mr. Schow was an employee doing work for us. He quit and Mr. Johnson took his place. So we had three employees.

Q. Did you pay those employees, all of them, at your regular rate?

A. Yes.

Q. And the rate is indicated on the slip here, forty cents per hour for the women and for Schow and Johnson forty cents per hour, is that right?

A. Yes.

Q. Do you consider that to be a reasonable rate for the service they rendered?

A. Yes.

Q. What about the other two employees that were not your employees? Is the rate you paid them of seventy-five cents an hour a reasonable rate for their services?

A. Yes.

Q. And Mr. Jeppson, one week at thirty-five dollars, is that reasonable?

A. Yes, that was the regular salary.

Q. Will you indicate what the other items are, underneath?

A. We had moving van, Howard moving van, which cost twenty-seven dollars—

Mr. Clay: Just a minute.

I move it be stricken, if your Honor please. I now object

to any testimony showing the expense of moving or the difference in rent or any other expense incident to the items listed on Exhibit 7 as immaterial, irrelevant and incompetent.

347. The Court: I think you made that objection, and it has been stipulated—

Mr. Clay: I wasn't sure it went to all of them. I thought it went to Mr. Jones'.

The Court: I understood it went to all of them that undertook to use that method.

Mr. Nelson: That is right.

Mr. Clay: If it does not so show, may the record show it is so understood?

The Court: Yes, and it may relate back from the beginning and go forward to the future.

Mr. Clay: For time and eternity.

The Court: So you won't have to repeat it.

By Mr. Nelson:

Q. Will you refer to the other items on the list and indicate briefly what they were for?

A. The moving expenses were for moving the stock and this heavy equipment.

Q. Were these people your employees?

A. No, they were regular moving people.

Q. What about the other items?

A. We paid Mr. Taylor \$53.50 for electrical labor and some merchandise, and the electric supplies from Felt Electric were supplies needed to wire for our machines. And

348 we had lumber for the dressing room we built, and the chemicals we used were for cleaning the floor and walls and general cleaning, and also treating the floors. And we had labor for stamping envelopes, \$6.40.

Q. That is the envelopes you had on hand showing your old address?

A. And invoices, and all.

We had a water bill—we were charged for a water bill in our new location which we had not paid in the other location.

Q. You got water with your rent in the other building?

A. Yes.

Q. You had to pay for water in the new location?

A. Yes, sir.

Q. This item, \$20.66, how was that estimated?

A. At eight dollars a year.

Q. Is that the minimum rate in the city here?

Q. I understand two dollars a quarter is the minimum rate.

Q. So you have estimated it at the minimum?

A. Yes.

Q. The item at the bottom, additional rent, how have you computed that?

A. I understood the government had the option on the building we left up until June 30, 1945. We have computed the difference in rent from December 1, 1942, to June 30, 1945.

Q. That is the difference between the rent you were paying at the Terminal Building and the rent you would be required to pay at these premises, is that right?

349 A. Yes, sir.

Q. The rent at the present premises is what?

A. \$65 for the first six months, \$75 for the balance of the time.

Q. Exhibit 7, Mr. Brockbank, to summarize, are all the items of expense on this exhibit—were all those items incurred necessarily by you by reason of your moving from the old location to the new location?

A. Yes.

Q. And were all the amounts paid for labor and materials in your opinion reasonable amounts and necessary amounts for this labor and materials?

A. Yes.

Q. You consider all the items on Exhibit 7 to be fair and reasonable in every respect?

A. Yes.

Q. And a necessary consequence of your having to move?

A. Yes.

Mr. Nelson: We offer in evidence Exhibit 7, if your Honor please.

Mr. Clay: We object to it, if your Honor please.

The Court: The same old objection?

Mr. Clay: That is right.

The Court: The same ruling.

Mr. Clay: Exception.

350 (Exhibit No. 7, offered and received in evidence, is in words and figures as follows:)

"Exhibit 7

"Expenses of Moving for Brockbank Apparel Company of Merchandise and Stock and Fixtures From 222 South West Temple to 50 West First South Salt Lake City Utah.

"Labor	Lloyd Anderson	83 hrs at 75c	62.50	
	Lynn Hales	24 " 75	18.00	
	Dick Schow	62 At 40	24.80	
	Paul Johnson	23 " 40	9.20	
	Mrs. Harcastle	8 hrs—		
	Miss Adams	8		
	Mrs Hurley	4		
	Miss Jeppsen	4		
		28 at 40	11.20	
	Harvey Jeppsen 1 week		35.00	
	Van moving Howard		27.00	
	Eagle		8.75	
	Electrical labor and mdse			
	Le Roy Taylor		53.50	
	Electrical supplies Felt Electric		43.43	
	Sign windows Bird and Jex		15.00	
	Lumber and supplies Noal Lbr and			
	McConaughy Loosee Lbr etc		23.26	
	Chemicals and cleaning supplies,			
	sand paper etc for cleaning			
	floor		33.05	
	Magic Chemical Co			
	Labor stamping new address on			
	2000 envelopes letter heads, in-			
	voices etc		6.40	
	Keys paint rods and new address			
	stamps etc.		6.00	
	Water Bill at new location for			
	31 months		20.66	
			397.50	397.50

Additional rent for 31 months
from Dec. 1 1942 to June 30
1945—65.00 per month for
first six months and 75.00 per
month for balance of time.

1567.50

Total

1965.00

Less allowance for cleaning

37.20

Total asked for

1927.80''

By Mr. Nelson:

Q. Mr. Brockbank, was it necessary for you to sign a lease to obtain possession of your new premises?

A. Yes.

(A document was thereupon marked by the reporter Exhibit No. 8, for identification.)

Q. I hand you what is marked for identification Exhibit 8, and ask you to state whether or not that is the lease which you executed for the premises which you now occupy?

352. A. Yes.

Q. And were you required to pay the rent from December 1, 1942, to get possession of those premises?

A. Yes.

Q. Rent of \$65 a month for the first six months and \$75 thereafter, is that correct?

A. Yes.

Mr. Nelson: We offer in evidence Exhibit 8, your Honor.

The Court: It is your lease; you better keep it in your possession. Read it into the record, anything you want from it. Do you want anything except the price paid?

Mr. Nelson: That is about all. The price of the premises is all we are interested in. I don't think the jury need be burdened with the details of it.

The Court: Either one of you can read anything in the record from it.

Mr. Nelson: May the record show, your Honor, this lease, Exhibit 8, provides for the rental of premises at 50 West First South which this defendant Brockbank is now

occupying, for a period of one year from the 1st day of December, 1942, to the 30th day of November, 1943, at a rental of \$65 a month for the first six months, and \$75 per month for the last six months.

Q. You consider that rent to be a reasonable rent for these premises, do you, Mr. Brockbank?

A. Yes, sir.

353 Q. And the best you could obtain?

A. Yes, sir.

Q. Referring again to Exhibit 7, you have an item at the bottom entitled "Less allowance for cleaning \$37.20".

Will you indicate what that is?

A. The Clayton Investment gave us a reduction of that amount for the part of the work we did, and material used on the floors and cleaning the building.

Q. So with that credit deducted from the other items, the balance represents your full cost, doesn't it?

A. Yes.

Q. In the moving?

A. Yes.

Q. You have not received, have you, any other reimbursement or credit in any way for any of the costs or items on that list?

A. No, sir.

Q. What is the comparison as to the adaptability and utility of these premises to your purposes?

Mr. Clay: I object to that because it is obviously a conclusion. He has related all the details. It is for the jury to pass on it.

The Court: I think for him to make comparison—He might state it properly in his answer, and he might not. But if it is a matter of location or a matter of space, or whatever it may be—not to say, This place in my opinion the rent is too much or the location—that doesn't mean anything.

354 By Mr. Nelson:

Q. Mr. Brockbank, in your new location at 50 West First South, what is the nature of that locality with respect to the type of business being done around there?

A. That location is definitely a retail location. We have

no use for that particular kind of location. Our business is about ninety-five per cent wholesale and institution business—I mean by that hospitals and industrial plants.

Q. Would you say, then, that a wholesale location would be more adaptable to your purposes and uses than a retail one?

A. Yes, it is.

Q. The old place you would say is a wholesale location?

A. Yes. That is where the dress houses and manufacturers are more centered, on West Temple or Second South.

Q. I will ask you whether the location of the Terminal Building is more desirable for your purposes than the place you now occupy?

A. Yes, sir.

Q. From the standpoint of location?

A. Yes, sir, from the standpoint of location. It is also better because of the light and the ventilation.

Q. What is the difference in the ventilation?

A. We have to ventilate from the front and rear. We have no ventilating system at our present location, no side windows, no side ventilation. That means we have to open up almost the entire back—front and back—in order to get circulation.

355 In March; that was last month, we had complaints from our employees, it was too hot, with all the ventilation we had open.

In the old location we were able to open those windows, the entire group of windows, so we had plenty of ventilation and plenty of light. In our present location we have to use light the full day from our fluorescent light, the machine lighting all day also, so we use in our present location light all day.

We know we have got to put in a ventilating system in our new location, in order to work. That is the indication now. We haven't been there a summer, but if March is unbearable, we must arrange for that, of course.

Q. Is artificial light as satisfactory for the use of your employees as natural light?

A. We don't think so. We had the fluorescent light. They are not as good as natural light.

Q. And you have to pay for the artificial light?

A. Yes.

Q. Which way does this place front, the place you are in now?

A. It faces south.

Q. Glass windows in the front?

A. Glass windows in the front, the entire height of the building, practically the entire width of the building.

Q. Get the sun through these windows on a clear day all day long?

A. Yes. We have an awning, but it is not sufficient to cover the entire frontage.

356 Q. I will ask you again, in reference to the labor and work done in your moving operations and in fixing up the new place whether or not you charged anything for your own services?

A. No, I have not.

Q. Did you render some services in that matter?

A. I thought about three-fourths of it. I spent a good many hours and days without making any charge.

Q. Any other way in which these premises are inadequate or insufficient in comparison to your other place?

A. No, the floor space is about the same as the red portion shown on the map of our previous location, so our machinery fit in about the same, and equipment.

Q. That is, the floor space of your present place is about the same as this long part of the building marked in red?

A. Yes.

Q. Exclusive of the vault?

A. Exclusive of the vault, yes.

Q. Do you have a vault where you now are?

A. No.

Q. You say this basement room is not satisfactory or usable for the purpose which you tried to use it for, as a rest room for the ladies?

A. Yes. They won't use it. They don't go down there at lunch time. We allow them a ten-minute period in the morning and afternoon. They won't go down and relax down there.

Q. There is no ventilation there?

357 A. No ventilation.

Q. And no light. What use is that basement space to you?

A. We use it for storage of supplies and boxes.

Q. What portion of it?

A. At the present time we have supplies along the wall. Mostly isn't used, I would say, with the exception of where we built the room for the ladies' rest room. Maybe one-fourth of it could be used. We could use one-fourth of it for storage.

Q. For all your storage purposes I will ask you whether or not the room at the rear of your old place in the Terminal Building on the south side was adequate to take care of your storage space?

A. Yes.

Q. And that is all the storage space you need where you are now, is that right?

A. Yes.

Q. And you are lacking a rest room?

A. Which is a very vital part, where you have lady employees it is a serious problem.

Q. How often do you consider it is necessary for women to have rest periods to go to rest rooms?

A. The law demands—

Mr. Clay: I think that is highly speculative, immaterial and irrelevant.

The Court: That would be going too much into detail, so I will sustain the objection.

358 Mr. Nelson: You may cross-examine.

Cross Examination.

(By Mr. Clay:)

Q. I didn't understand just how much floor space you have at your new location?

A. On the main floor, 1976.

Q. 1976 square feet. And in the basement?

A. It is a full basement.

Q. 1976 square feet down there also?

A. Yes, sir. It is more than that. It goes over underneath the sidewalk, which is not usable.

Q. At least 1976 square feet?

A. Yes, sir.

Q. Do I understand that is more floor space than you had in your old location?

A. The main floor space—the total floor space is more, basement and main floor.

Q. But the main floor is not as much as you had in the old location?

A. No, sir.

Q. In your rooms, 241 and 242, in the old building, were you paying rent on those two rooms?

A. We were paying rent, a certain monthly rental for the space we occupied.

Q. How long had you been occupying rooms 241 and 242.

A. About four years.

Q. And prior to that time you occupied the space you refer to with the exception of these two rooms?

359 A. Yes, sir.

Q. When you began using these two rooms did you pay additional rent?

A. No, sir. These two rooms were vacant, having no use, they were not being used. We needed a place for the ladies to relax, go in for a rest, and I asked the agent of the Union Trust if we fixed them up if we could use them.

So we went to the expense of fixing them up, making them livable, and he gave us permission. We put a lock on the door because of the building being open. That was the understanding; if it would cost them, nothing, if we would bear the expense, we could use those rooms at no additional rent.

Q. So you moved in and used rooms 241 and 242 for four years without paying any rent?

A. I wouldn't say that. We paid rent as we had been doing.

Q. Without any increased rent?

A. That's right.

Q. So apparently wasn't very much demand for space in that locality, was there? Wasn't very much demand for space on the second floor on both sides of you and all around you?

Mr. Nelson: Object to that as immaterial and irrelevant.

The Court: The objection may be overruled.

Mr. Clay: You didn't answer the question.

The Witness: Would you mind asking it again?

360 By Mr. Clay:

Q. I say, there was no demand for that space during the time you occupied it?

A. We never had any request to move out.

Q. Do you know Mr. Sorenson?

A. Yes.

Q. He was in the real estate business there, was he?

A. Yes.

Q. Is that Mr. Sorenson standing in the door there as shown on Exhibit I?

A. Yes, sir, I think it is. It is not very clear.

Q. Calling your attention to all these exhibits concerning which you have testified—let me call your attention to Exhibit F, which shows some plumbing fixtures on the floor. Do you know who took those fixtures out?

A. I don't know the workmen.

Q. I mean, do you know under whose instructions?

A. Whether taken by Mr. Richards or the government, I wouldn't know.

Q. Of course those plumbing fixtures weren't piled in the hallway all through your entire tenancy, but aside from the plumbing fixtures in the hall and the ladder and other things, does that fairly reflect the condition of that particular part of the building on or about November 11th?

A. Yes, sir.

Q. Is that true with the rest of these photographs, Mr. Brockbank?

A. May I see them?

361 Q. I will hand you Exhibit J?

A. I don't recognize this portion of the building (indicating).

Q. Would that be the north corridor of the building, do you think?

A. It looks like the space across the open court to the north.

Q. Does that fairly reflect the conditions as they existed on or about November 11th?

A. I would say it does, of this unoccupied space shown in the picture.

Q. Calling your attention to Exhibit K, in which the man appears. Does that fairly reflect the condition as it existed at that date, aside from the figure of the man?

A. As far as I know it would, Mr. Clay.

Q. Were you required to enter into a one-year lease at the new location?

A. Yes, sir.

Q. That is, from the 1st day of December, 1942, until the 30th of November of 1943. Do you consider this lease a liability to your business or an asset to your business?

A. I don't know whether either or not.

Q. If you wanted to sell out your business don't you think a lease on these premises would be an inducement to the buyer to buy your business?

A. No, sir.

Q. You think you could get just as much for it without a lease as though you had a lease?

362 A. I don't know. I presume so.

Q. Mr. Brockbank, if you were going to buy any sort of business that had a good location, isn't the first thing you would ask about would be whether or not the seller had a lease on the premises?

Mr. Nelson: We object to this as incompetent, irrelevant, immaterial, not cross-examination, and argumentative.

The Court: In view of his testimony I think probably it is cross-examination.

Mr. Nelson: Exception.

The Court: He is claiming, as I understand his testimony, that the government should pay his rent for him for a year.

Mr. Nelson: Exception.

(Last question read.)

A. Do you refer to the business I am in now—the location I am in now?


Q. The business you are in now.

A. We don't consider it a good location.

Q. I didn't ask about the location. I asked, if you were doing the kind of business you were in in any good location, isn't that the first thing you would inquire about, if he had a lease?

A. I would like to know that.

Q. Do you figure that your business had depreciated in value because you had to move?



363 The Witness: What is that question, again?

Q. Do you think your business has depreciated in value because you had to move from your old location?

A. I think our potential sales from customers who would come into our business has decreased, yes.

Q. By the customers that come into your business—you mean retail trade or wholesale?

A. Wholesale trade, buyers from retail stores.

Q. Is that because you had two competitors in the same block?

A. It is because we were in the selling section, or the wholesale division.

Q. By "the selling section", you mean Mr. Patrick was close to you, and the Pyke business was close to you, is that right?

A. Yes, sir.

Q. You think because you are now a block farther away that you are going to lose some trade?

A. Yes, sir.

Q. If somebody was going to buy your business at the old location, and if you didn't have a lease, would you feel the same way about it, that they might have to move at any time and would thereby lose business?

Mr. Nelson: Objected to as incompetent, irrelevant, immaterial, not cross-examination.

The Court: The objection may be overruled.

Mr. Nelson: Exception.

(Last question read by the reporter.)

364 By Mr. Clay:

Q. I say if by moving you lose business, wouldn't a prospective buyer take that into consideration if he were going to buy you out?

A. If there was any material amount, yes, I think he would.

Q. Your business is worth some material amount, isn't it?

A. I wouldn't know. I have no way of judging.

Q. If you were going to sell out your business lock,

stock and barrel, you would have some judgment as to its value, wouldn't you?

A. Yes.

Q. You built it up over a period of years, I take it?

A. Yes, sir.

Q. You have a number of people employed, and you keep them busy a great part of the time, is that right?

A. Yes, sir.

Q. So you do place some substantial value on your business, don't you?

A. Yes, it is worth stock in trade.

Q. And the good will—you wouldn't want to give it away, would you?

A. No. We can't sell it, either.

Q. You say you can't sell it?

A. Not often.

Q. You could sell it if somebody wanted to buy it? There is no law against it, is there?

A. No.

Q. I notice your lease runs to November, 1943, yet you have charged against the government the difference between \$22.50 a month and \$65 a month for six months and \$75 for the balance of the time, is that right?

A. That is right.

Q. Making a total of \$1567.50; that is correct?

A. Yes, sir.

Q. Why did you just make it for thirty-one months? Why didn't you make it for sixty months?

A. Because I understood that the government leased the building we occupied and would have an option up to June, 1945.

Q. Suppose you knew we had an option for the next ten years, would you add the difference between \$22.50 a month and \$75 a month for the next 120 months?

A. Questionable; I don't know.

Q. If Mr. Stevens testified yesterday the government would have an option on the building for the next ten years, would you like to amend this exhibit to show sixty months instead of thirty-one?

Mr. Nelson: Objected to as incompetent, irrelevant and immaterial.

The Court: The objection may be overruled.

Mr. Nelson: Exception.

By Mr. Clay:

Q. I mean 120 months instead of 31 months?

A. Would I want to do that?

Q. Would you like to do that?

A. I can.

366 Q. Would you like to?

A. No, I wouldn't think it was necessary.

Q. How much difference have you figured—for the first six months \$65 a month and you paid \$22.50, that is \$42.50 a month. Did you pay \$20.50 a month?

A. \$22.50—a difference the first six months of \$52.50.

Q. And the next six months?

A. That is wrong—\$47, I guess, \$22.50 against \$65.

Q. That would be \$42.50?

A. Yes.

Q. For six months, and \$52.50 for six months, is that right?

A. That is right.

Q. Did you average that up over the period of thirty-one months? What I am trying to get at, you have additional rent for thirty-one months, from December 1, 1942, to June 30, 1943, \$65 per month the first six months, \$75 per month for the balance of the time, that is what you did?

A. That is right.

Q. You don't know whether you will be here in your present location for the balance of the time, do you?

A. For what time?

Q. Thirty-one months.

A. No, sir.

Q. And if you are there for the next thirty-one months you don't know how much rent you may have to pay, do you?

A. No, sir.

Q. This lease is for one year?

367 A. Yes, sir.

Q. And for all you know the landlord may double the rent at the end of one year, is that right?

A. Well, the indications are not; the information I get from other tenants.

Q. In so far as your legal rights are concerned, you can hold the landlord to this lease only for one year, can't you?

A. Yes, sir.

Q. At the end of that time you might have to vacate these premises?

A. I may want to move.

Q. You are on the first floor here. So far as your retail business is concerned, isn't the first floor better for that business than the second floor?

A. We have no retail business.

Q. Ninety-five per cent wholesale?

A. About five per cent retail.

I mean by that, hospitals and institutions come in for uniforms for training purposes.

Q. In so far as the five per cent is concerned, your location on the first floor at the present address is better than the location on the second floor at the old address?

A. No, sir.

Q. During the ten years you were at your old location were you ever requested to enter into a lease?

A. Not to my knowledge.

Q. You never requested the landlord to give you
368 a lease?

A. No, sir.

Q. You knew the building was owned by the Metropolitan Life Insurance Company, that was your understanding?

A. Yes, sir.

Q. You knew that company for several years had been trying to sell this building—did you have that understanding?

A. They had a sign on the building that it was for sale.

Q. When did you pay your rent, what day of the month was your rent due in the old location?

A. The 1st of the month.

Q. Did you pay rent on the 1st day of November, 1942, on or about that date?

A. No, sir.

Q. Pay any rent during November?

A. No, sir.

Q. Have you ever paid any rent to Mr. Richards?

A. No, sir.

Q. Did you know he was the owner of that building at the time you vacated, or before you vacated?

A. We had no written notice, no, sir.

Q. So far as you know, the Metropolitan Life Insurance Company still owned it?

A. No, I was out of town; I understood Mr. Richards came into our office when I was out and talked with our office manager.

Q. At any rate, you never paid him any rent?

A. No, sir.

369 Q. Has any rent been refunded to you on the old building for any overpayment you may have made?

A. No, sir.

Q. You had fluorescent lights in your old location?

A. Yes, sir.

Q. And those lights you moved to your new location?

A. Yes, sir.

Q. I believe you testified on direct examination that some of these people were your employees, some of the people whose names you listed here as having been paid different sums of money, some were your employees and some were not?

A. Yes, sir.

Q. One item, "Electrical labor and merchandise, Le Roy Taylor, \$53.50." Was he an employee?

A. No, sir.

Q. Was he in the electrical business for himself?

A. Yes, sir.

Q. "Sign on the windows, paid Bird & Jex \$15"—what was that sign?

A. "Brockbank Apparel Company" on two windows.

Q. "Chemicals and cleaning supplies, sandpaper and so forth for cleaning floor, \$33.05". Did that include labor?

A. No, that is just supplies.

Q. Did you have to pay for sanding the floors?

A. We had help, but I did a lot of it myself.

Q. Did you use a sanding machine?

A. Yes, sir.

370 Q. Borrowed the machine or rented it?

A. Yes, sir.

Q. Did some of that yourself?

A. Yes, sir.

Q. You have water bills at new location for thirty-one months amounting to \$20.60. I take it the thirty-one months' water bills which you figure at eight dollars per year covers a period from December 1, 1942, to June 30, 1945?

A. Yes, sir.

Q. Those are bills which you anticipate you may have to pay if you are at that location that long, is that right?

A. Yes, sir.

Q. Less allowance for cleaning. That was \$37.20 which you say the landlord paid?

A. I was after him to clean the place up and get the floors cleaned. He just wasn't able to do it, and didn't do it. After it was all done he gave me a reduction of \$37.20.

Q. That was paid by the landlord?

A. Yes, sir.

Mr. Clay: I think that is all, except I want to go through this lease, and if I find some provision that I would like to get in the record, I would like to do that.

Redirect Examination.

(By Mr. Nelson:)

Q. Mr. Brockbank, Mr. Clay called your attention to Exhibits J and K, showing the condition of the unoccupied portion of the premises. I will ask you now whether or not those parts of the premises shown in Exhibits J and K were any part of the premises which you occupied or which were visible to you in your ingress and egress to and from the premises in the Terminal Building?

A. No, sir.

Q. You rarely if ever saw those places?

A. There was a locked door which did not allow you to go around in those sections. It was a locked part from the rest of the building.

Q. So, so far as your use of the premises is concerned, the condition of those parts in J and K made no difference to you?

A. The customers or no one saw them, as they were locked out.

Q. I believe you have indicated that you understood Mr. Richards took over the ownership of the Terminal Building

prior to the time the government ordered you to move, is that right?

A. Yes, sir.

Q. Do you know about when that was?

A. I wouldn't know offhand the exact day. I know I was out of town when he notified our office manager probably be a new landlord.

Q. Did you also understand the rent you paid to the Union Trust was pro-rated to Mr. Richards as of the date he took possession?

A. No, I didn't know.

Q. Didn't know whether it did or not?

A. No.

372 Mr. Nelson: I think that is all.

J. E. NELSON, was thereupon called as a witness by and on behalf of the defendants, and having been first duly sworn herein, testified as follows:

Direct Examination.

(By Mr. Nelson:)

Q. State your name, please.

A. J. E. Nelson.

Q. What is your residence?

A. I am living at Bountiful.

Q. What is your occupation?

A. I am secretary and treasurer for Patrick Dry Goods Company, in charge of credits.

Q. Where is the place of business of that company?

A. 163 West Second South.

Q. Where is that from the Terminal Building?

A. It is about a block. The Terminal Building would be up about three-quarters of a block and down a quarter of a block south.

Q. How long have you been with the Patrick Company?

A. Over thirty years.

Q. Have they been in that location?

A. They have been in that location for about twenty-five years.

Q. Do you know whether the Patrick Dry Goods Com-

pany handles some of the same accounts as the Brock-
373 bank Apparel Company?

A. Yes, we sell some of the same accounts.

Q. Are you familiar with the nature of the location in and around that vicinity of the Terminal Building and your location?

A. Yes.

Q. What would you say the nature of that location is as to business?

A. It is a wholesale district.

Q. Is it appropriate and adaptable for the uses of a business such as yours and the Brockbank Apparel Company?

A. Yes.

Q. Your business is similar to the Brockbank Apparel Company, is it?

A. We have some lines that he carries, although we have probably more extensive lines than he carries.

Q. Are you also familiar with the location in which Mr. Brockbank is now situated, on 50 West First South?

A. I have seen the building and been in it.

Q. Are you familiar with the location there with respect to the type of business that is done in that locality?

A. Yes. It is a retail district principally, I think, over there.

Q. With respect to those two locations, the one in the Terminal Building where he formerly was, and the one on 50 West First South where he now is, which would you say would be the most desirable location from the standpoint of that type of business?

374 A. I would say that a business of his type would have more advantages in the wholesale district.

Q. Where he was formerly?

A. Where he was formerly.

Mr. Nelson: I think that is all.

Cross Examination.

(By Mr. Clay:)

Q. And is it a damage that could be measured in dollars and cents?

A. When merchants come into town to buy, they come into these wholesale districts—

Q. How far is he now from the old location?

A. About two blocks, I imagine.

Q. He is on First South, and before he was in the 200 block on South West Temple?

A. That is right.

Q. You mean out-of-town merchants come in?

A. They come into town. Most of the business we do is done through salesmen. I think Mr. Brockbank's business is the same. But occasionally merchants do come into town to buy, and come to our business.

As I say, the Pyke Manufacturing is in that district, I think there is some advantage. I notice throughout the country, wholesale districts band together, Los Angeles, South Los Angeles Street you will find most of the wholesalers there. The same with Mission Street, in San Francisco. I think some advantages there in having them together.

Q. Hard to measure it in dollars and cents?

A. Hard to measure it in dollars and cents.

Q. But ordinarily they do flock together?

A. They do flock together.

Q. And ordinarily they value those locations?

A. Yes, I imagine so.

Q. A location may be worth a good deal of money in some instances, is that right?

A. Yes, I would say so.

Q. And in your opinion do wholesalers who value their location and consider it a considerable asset of their business, secure a lease on the premises occupied by them?

Mr. Nelson: Object to it as incompetent, irrelevant, immaterial and not cross-examination.

The Court: Put in that form it would be objectionable. But he said a certain locality is desirable, probably more so than the other.

If you want to ask him directly whether or not having a term lease makes any difference or not—the question as you ask it is too broad. Let's confine ourselves to the situation over here.

By Mr. Clay:

Q. If in your location, for example, or the Pyke location, or the location formerly had by Mr. Brockbank, would a lease of the premises in your opinion enhance the value of his location?

A. You mean a lease on his present location?

376 Q. The old location.

A. I don't know that it would.

Q. You understand in the absence of a lease he may be required to vacate any time?

A. Yes.

Q. And in your location, the Patrick Company, in the absence of a lease you could be required to vacate at any time? You understand that?

A. Yes, that might be true.

Q. Don't you take that into consideration in valuing the location of the business?

A. Yes, be some advantage to it.

Q. Considerable, wouldn't there be?

A. Yes.

Q. You would be shocked at the idea of the Patrick Company having to move on thirty days' notice, wouldn't you?

Mr. Nelson: Objected to as incompetent, irrelevant, immaterial, not cross-examination.

The Court: In that form it is objectionable. You want to find out whether he had a lease or not?

Mr. Clay: Yes.

The Court: Well, ask him.

By Mr. Clay:

Q. Does the Patrick Company have a lease on the premises they now occupy?

A. No.

Q. They just lease from month to month?

377 A. We had leases in the first part of our business, but we have a gentlemen's agreement with the landlord. I don't think he would ask us to get out.

Q. You don't own the building?

A. We don't own the building.

Q. For how long a period did you have a lease?

Mr. Nelson: Object to it as immaterial.

The Court: The objection may be overruled.

A. About the first ten or fifteen years.

Mr. Clay: That is all.

Redirect Examination.

(By Mr. Nelson:)

Q. Mr. Nelson, you seemed a little uncertain whether there is any advantage in having a written lease. Calling your attention to the case where you did have a lease for a definite time and a certain amount per month, in the event you have such a lease on business premises and a depression period came up, would you consider the lease to be of an advantage or disadvantage?

A. Probably be a disadvantage under those circumstances.

Q. So the question of whether it is an advantage or disadvantage depends entirely upon the circumstances of the future, doesn't it?

A. Yes.

Mr. Nelson: That is all.

Recross Examination.

(By Mr. Clay:)

378 Q. Good business dictates, for the security of your location that you have a lease, wouldn't you say, Mr. Nelson?

A. Yes, I think that is true.

Mr. Clay: That is all.

O. C. NIELSEN, was thereupon called as a witness by and on behalf of the defendants, and having been first duly sworn herein, testified as follows:

Direct Examination.

(By Mr. Nelson:)

Q. State your name, please.

A. O. C. Nielsen.

Q. What is your residence?

A. 547 Twelfth East, Salt Lake.

Q. How long have you lived in Salt Lake?

A. All my life.

Q. What is your occupation?

A. I am manager of the property management department of the Union Trust Company.

Q. That is a Salt Lake City business house?

A. Yes, sir.

Q. Situated on Third South and Main?

A. Yes.

Q. In the Judge Building, on the ground floor, in the corner?

A. Yes, sir.

379 Q. How long have you been property management head of that firm?

A. For about four years, head of the department. I have been in the department for approximately nine years.

Q. What is the nature of the business of the Union Trust Company, in general?

A. We have a mortgage loan business, property management, also loan correspondent for the Metropolitan Life Insurance Company.

Q. And what is the nature of the business your department in the Union Trust Company particularly handles and have handled for the past nine years?

A. Managing residential and business properties, hotels, rooming houses for various clients.

Q. You mean residential and business properties?

A. Yes, sir.

Q. What specific business properties has your department managed and controlled, some of them?

A. One time we handled the Terminal Building. The McIntosh Building on Second South and Main. At the present time the properties owned by the Metropolitan Real Company on Third South and Main, and the building 47 to 59 West Third South now occupied by the National Replacement and several other buildings in that vicinity.

Q. In the past several years have you handled rentals for a great number of business properties in Salt Lake City?

A. Yes, sir, we have.

380 Q. Including a number of others you have not mentioned?

A. That is right.

Q. What experience and training have you had in the real estate business, particularly with reference to rentals and real estate values?

A. I have had considerable experience in appraising, establishing of rent values, done all the appraising for the Metropolitan Life Insurance Company for the last five years covering the states of Utah and Idaho.

Q. What was your occupation prior to the time of coming with the Union Trust Company nine years ago?

A. I was chief estimator with Morrison Merrill Company, building construction.

Q. How long were you with them?

A. About thirteen years.

Q. What did your duties consist of there?

A. Compiling material lists, appraising building values; building costs, costs of construction, supervising of construction.

Q. On what properties—what nature of properties?

A. They were scattered all over the state of Utah and Idaho, that was the territory we had. At that time school houses, apartment houses, residential. The addition to this post office at one time, the Odgen post office; considerable government buildings.

Q. Any business properties?

A. Yes.

381 Q. Quite a number of business properties?

A. Business properties and theatre buildings.

Q. In your experience during the past nine years and the thirteen years preceding, I will ask you whether you have become familiar with rental values of business properties in Salt Lake City?

A. Yes, sir.

Mr. Clay: We will admit Mr. Nielsen's qualifications.

Mr. Nelson: As an expert upon rental values?

Mr. Clay: That is right.

By Mr. Nelson:

Q. Mr. Nielsen, I will ask you whether or not, prior to November 11, 1942, for many years you in your capacity in the rental department of the Union Trust Company actively handled the rental of the Terminal Building?

A. Yes, sir.

Q. In behalf of and for whom.

A. For Metropolitan Life Insurance Company.

Q. They were the owners of the building for a number of years preceding the time Mr. Richards took over?

A. Yes, sir. I believe it was in July of 1937 until October 26, 1942.

Q. That is when Mr. Richards took title to the building?

A. Yes, sir.

Q. During all that period of time you actively handled the rental and collected the rents from the tenants
382 in the Terminal Building?

A. Yes, sir, this office had full charge subject to the New York office's approval.

Q. Calling your attention to the 26th day of October—

A. I believe that is the date Mr. Richards took over.

Q. Did you collect some rents for periods after the 26th day of October, 1942?

A. Yes, we collected the entire rent for the month of October and pro-rated the rents and refunded the portion to Mr. Richards that he was entitled to from the 26th on.

Q. Any rents you collected after the 26th were paid to Mr. Richards?

A. Yes, sir.

Q. You are acquainted with Merrill J. Brockbank—the Brockbank Apparel Company, are you not?

A. Yes.

Q. You also are familiar with the premises he occupied in the Terminal Building prior to the time he was evicted in November of 1942?

A. Yes, sir.

Q. What did those premises consist of?

A. They consisted of a tier of offices on the second floor.

Mr. Clay: I think there is no dispute about that Mr. Nelson.

A. (continued:) Mr. Brockbank occupied the tier of rooms—we designated them as rooms 210, 235, 236, 237, 238, 239 and 240. He occupied that space at the time we took the building over. Since that time he got our consent to remodel the two rooms on the opposite side of the hallway, 241 and 242, at his own expense, without any additional rent.

Q. In other words, he was permitted to occupy those rooms as part of his rental of the entire premises?

A. That is right. The rooms were vacant and in bad condition, and he spent considerable time and money fixing them up.

Q. That is these two rooms on the south, here?

A. Yes, sir.

Q. Did he also have the right to use and occupy the vault at the rear, here?

A. There was a vault at the rear. He had the only access to it. So he used that along with the other space he occupied.

Q. You have heard the dimensions given by Mr. Brockbank of those premises he occupied, have you?

A. Yes, sir.

Q. Including the vault?

A. Yes, sir.

Q. Would you say that was an accurate statement of the conditions?

A. That is fairly correct, yes, sir.

Q. His rental was \$22.50 a month for the entire premises?

A. That is right.

Q. How long had he paid that amount of rent for those premises, do you know?

A. Mr. Brockbank was a tenant at the time the Metropolitan took title to the property, and the rent was \$22.50 at that time, and no effort was made to increase that, at any time.

Q. As to the condition of the premises in the Terminal Building, you were familiar with the condition and state of repair and cleanliness of those premises, were you not?

A. Yes, sir.

Q. I will ask you whether or not they were generally kept in a good state of repair and condition so far as the occupied premises and the halls leading to them?

A. The occupied portion was kept in sanitary and clean condition. The unoccupied portion, I think it was in the same condition today as it was the day we took over the property. That was in a dilapidated condition, locked off and shut off from the eyes of people that might come into the occupied portion.

Q. What about the occupied portion as far as Brockbank was concerned—was that in good repair?

A. It was in fair condition. It wasn't painted as elaborate as might be.

Q. As to the stairway and halls leading to it, what was the condition there?

A. They were fair. The stairs were safe. I saw to that. It was my duty to see that the building was safe. We had no complaints from the tenants.

Q. I show you what is marked Exhibit B, and ask you to examine it and state if you can whether or not that represents an accurate picture of the condition of the premises before Mr. Richards began his construction work 385 and before the government took over?

A. No, I wouldn't say we left plaster—

Mr. Clay: We don't contend that they left plaster. We offered the exhibits for the purpose of showing the condition of the walls and the ceilings.

The Court: There is no objection made.

A. (continued:) These rooms and this hallway leading down to the front door were dusted and swept the best we could every day or so, possibly twice a week, as conditions demanded.

Q. They were in clean condition before this construction work started?

A. Yes. I inspected the premises every other day.

Q. As to Exhibit M, what would you say as to that being a photograph of the condition of the premises?

A. There is some building debris and old pipes lying here. Those ladders should not have been there. When we had it the floor would be swept up.

Outside of that, I would say that would be about the condition the walls would be in; looks a little dusty along the ledges here.

A. Ordinarily that would not be the way you would say—

A. No, we didn't permit this material to be left in the hallway.

Q. Always kept the hallways clear and clean?

A. Yes.

386 Q. Also as to Exhibit L, showing the outside of the premises, is that the customary condition, to have structural material around there?

A. No.

Q. Was that placed there by Mr. Richards in the course of his—

A. Yes, I believe this is his material he used in the cleaning and painting of the exterior.

Q. When Mr. Brockbank was noticed to vacate these premises, about the 11th of November, 1942, did he ask you to assist him in locating other premises?

A. Yes, sir.

Q. Did you so attempt to do?

A. Yes, I did—for Mr. Brockbank and several others.

Q. What efforts did you make to find suitable premises for him?

A. I spent the biggest part of two or three days trying to find a suitable location, help them in any way I could.

Q. Where did you search? What localities in the city?

A. From South Temple to Fourth South, from First West to Second or Third East.

Q. Is your firm a member of the Multiple Listing Bureau, real estate board here?

A. Yes, sir.

Q. You have listings of all places available in the city?

A. Yes, sir.

Q. If there had been any place available suitable to his needs you would have known it at that time?

387 A. Yes, sir.

Q. You also went out and searched in addition to your listings?

A. That is right.

Q. What did you find, if anything, that was suitable for his use?

A. We had a space of our own on Third South, 47 West

Third South, the only available space we had, that we controlled at the time, had about 2200 square feet, and that was not suitable. That is the first place we went.

We tried several other locations, and I was unsuccessful in finding a suitable location. And I learned later that Mr. Brockbank had decided on a place on First South.

Q. 50 West First South?

A. That's right.

Q. Have you been in that place?

A. Just been by it. Haven't been inside, no, sir.

Q. Familiar with the place itself?

A. No, I haven't examined the property at all.

Q. Are you familiar with the reasonable rental value of the place Mr. Brockbank has?

A. I haven't had any experience on First South. Along Second and Third South, along West Temple, some on Main Street. I have had little experience with First South Street property.

Q. Would you say that location is a location for business houses such as Mr. Brockbank's, as good as the one he had in the Terminal Building?

388. Mr. Clay: I think that is speculative.

While I have a high regard for this witness's opinion, he is not in that business, and his judgment may not be any better than members of the jury.

The Court: I don't know whether you have qualified him or not—You might ask him whether he familiarized himself with this particular business

By Mr. Nelson:

Q. You are familiar with the nature of the business transacted by Mr. Brockbank, are you?

A. Yes, sir.

Q. Manufacturing wholesale establishment for making and distributing ladies' ready-to-wear?

A. Yes, sir.

Q. From that information and from your experience in your real estate work are you able to pass an opinion on the desirability of certain types of location for that type of business?

A. I don't believe I am qualified to answer that. I had in mind, when I tried to assist Mr. Brockbank, that his requirements would be second floor space with sunlight, natural light. That is probably why I failed in finding that particular location. I knew that site was there, but I couldn't connect him up with that particular location.

Q. Mr. Nielsen, are you familiar with the reasonable rental value of premises on or about November 11, 1942, of premises of comparable location and nature and equipment and appurtenances to those occupied by the Brockbank Apparel Company in Salt Lake City?

Mr. Clay: He just testified he was not familiar with rentals on First South.

I object to the question as being ambiguous, and in so far as I am concerned, not understandable.

The Court: He may answer it by yes or no.

A. Yes, I am familiar with rental values.

By Mr. Nelson:

Q. Can you cite some of those locations?

A. Our company has several locations practically in the same line of business.

Q. That are occupied now, on which rent is being paid?

A. Yes.

Q. Where are they?

A. They are on West Temple and Third South.

Q. What building?

A. By the Western Printing Company, we own that entire quarter of a block there. We also have on the south side of Third South just east of West Temple. We did have a similar business in the McIntosh Building, where we had the fire—on Second South and West Temple.

Q. Do you know what the reasonable rental value of some of those places was on or about November 11, 1942?

Mr. Clay: I object to that.

The Court: He can answer that yes or no.

390 The Witness: I didn't get the question.

By Mr. Nelson:

Q. Do you know what the reasonable rental value of those comparable places was on or about November 11, 1942?

A. Yes.

Q. Will you state what they were?

Mr. Clay: I object to that. He says the reasonable value of these locations. I have no idea whether he is talking about office space—

The Court: In the neighborhood of the Terminal Building, he is locating them. I suppose a matter of qualification.

If you are going to try to prove what the rental value was, I would sustain the objection, because we are not going to try rental value of all the places in town.

Mr. Nelson: I am referring now to square footage, rental value compared to these.

Mr. Clay: I think that is speculative. Might be very high on Main Street and very low half a block farther west.

The Court: You can qualify him by asking him any questions he can answer by yes or no. I will confine you to either the Terminal Building or some of the space they have now moved to.

Mr. Clay: Exception.

Mr. Nelson: I take it from the ruling of the court we can proceed to qualify him.

391 The Court: Then if you want to ask him about any of these buildings that have been taken over by these parties, or the old Terminal Building, I will let you go into it. But we are not going into the rental of businesses that have no connection with this lawsuit except as a matter of qualifying him by saying that he knows.

Mr. Nelson: You may cross-examine.

Cross Examination.

(By Mr. Clay:)

Q. I want to get some dates in my mind. Was it October 26th that Mr. Richards took possession?

A. I believe that is the date.

Q. Let me ask you, please, did any of the tenants in

that building seek to get a lease from the Metropolitan Life Insurance Company on the premises?

Mr. Jones: As to the defendants I represent, I object to it as not cross-examination.

The Court: Did any of them have a lease?

Mr. Jones: One of ours did—the Pneumatic Tool Company.

The Court: Which one?

Mr. Jones: The Independent Pneumatic Tool Company. The other three did not.

I haven't put Mr. Nielsen on or examined him. If you are going to cross-examine him, I would like to examine him first.

The Court: You have asked all these parties if they sought to get any lease, and they said they did not. That ought to satisfy you.

392 Mr. Clay: I guess that is right.

The Court: None of them did, according to their testimony, except the one who has a lease.

Mr. Clay: I don't believe there is any cross-examination.

Mr. Nelson: That is all of our testimony, your Honor.

The Court: Who is next?

Mr. Jones: They rest?

Mr. Nelson: I think so. I want to talk to Mr. Nielsen, if I may, and possibly recall him, but I doubt it.

Mr. Romney: Ladies and gentlemen, we represent the Petty Motor Company, one of the tenants in these premises.

We shall show by the testimony that the Petty Motor Company negotiated a lease with the new owner of the building, Mr. Richards, after he acquired the property in October, that a written lease was entered into running from the 31st of October, 1942, to the 31st of October, 1943, with an option in the lessee, the Motor Company, to extend that lease for an additional year at a rental which will be brought out in the testimony.

We shall show the premises leased consisted of the entire basement of this building with the possible exception of a very small area under Mr. Grimsdell's printing office in the northeast corner.

393 We shall show that some expense was involved in the moving of trucks that were stored in the building.

We shall show at the time of the termination of the lease some sixty new trucks, and we will show you the cost involved in moving them to the many new locations which were required to house them.

We shall show you what the reasonable rental value of the premises occupied by the Petty Motor Company was for the unexpired term of this lease, which had about two years to run.

Other than that the case will be in many respects similar to that which has been offered by the other defendants.

Mr. Clay: Would it be inconvenient with you if I recall Mr. Nielsen for one or two questions?

Mr. Nelson: No objection.

O. C. NIELSEN was thereupon recalled to the stand for further cross-examination, and testified further as follows:

Further Cross Examination.

(By Mr. Clay:)

Q. Mr. Nielsen, you testified that you had had some difficulty in finding a location for Mr. Brockbank, and I believe some others, you said?

A. Yes, sir, that is right.

Q. Has there been a shortage of space of all kinds in Salt Lake City during the past six months or so?

394 A. Desirable space, yes, sir.

Q. Over how long a period has that existed?

A. I would say in the last two years.

Q. Space during that time has become scarcer and scarcer all the time, is that right?

A. I would say yes, I find it that way.

Q. In all localities where there is office space or ware-

house space or factory space or wholesale business or whatever it is?

A. Doesn't take in all that, no.

Q. Well, not factories—but different kinds of businesses such as were in the Terminal Building?

A. I would say yes.

Mr. Clay: That is all.

CHARLES B. PETTY was thereupon called as a witness by and on behalf of the defendants, and having been first duly sworn herein, testified as follows:

Direct Examination.

(By Mr. Romney:)

Q. State your name, please.

A. Charles B. Petty.

Q. Where do you live, Mr. Petty—what is your address?

A. 1455 Uintah Circle, Laird Avenue, Salt Lake City.

Q. Your business?

A. I am an automobile dealer, owner of the Petty Motor Company.

395 Q. The Petty Motor Company is one of the defendants in this action?

A. Yes, sir.

Q. The Petty Motor Company is a partnership?

A. Yes, sir.

Q. Consisting of whom?

A. Myself and my immediate family.

Q. That is your wife and your children?

A. Yes, sir.

Q. How long, Mr. Petty, have you been engaged in business?

A. The automobile business?

Q. Yes.

A. Twenty-seven years. I have been a Ford dealer longer than any other dealer in the state that I know of.

Q. You began business where?

A. At Hurricane, Utah. Then at Cedar City.

Q. And later came to Salt Lake City?

A. Came to Salt Lake City in 1936.

Q. And have been operating the Ford business since that time in Salt Lake City?

A. At Sugarhouse—we have a place at Sugarhouse—two places there.

Q. Where are they located?

A. We have one down on Main, too. We have one place there, very large place, one of the largest in the west, 227-foot frontage by 237 feet deep.

Mr. Clay: What is the materiality of this, Mr. Romney?
396 I object to it.

Mr. Romney: We want to show the nature of the business they were doing and the need for the premises in question.

The Court: That is what I supposed. You don't have to tell me. I could guess that.

And you can do that as preliminary. But don't stretch it out too much.

By Mr. Romney:

Q. You have one place in Sugarhouse, you say?

A. Didn't have sufficient room there, so we rented another place up the street a block for a reconditioning shop. Then we have a place, a used car lot, on Sixth South and Main.

Q. What is the nature of your business?

A. Primarily, in normal times, new automobile dealer, which includes the selling of new cars and used cars. We are one of the largest in the entire west—sold more automobiles than any other dealer in the state last year.

Mr. Clay: I am sure, if your Honor please, we are willing to concede he is a big dealer, and successful. I don't see why we should encumber the record with that. I object to it.

The Court: The objection may be overruled.

By Mr. Romney:

Q. Mr. Petty, in addition to the sale of new cars, do you have a servicing department?

397 A. Yes, sir.

Q. That is located in Sugarhouse?

A. Yes, sir, on 21st South at Ninth East.

Q. Could you state approximately the average of your volume of business done in the last year, 1942?

A. We have averaged having seventy-five employees for the past five years, and approximately a million dollars' worth of volume.

Q. Now, did your business cover the entire state of Utah, your sales business?

A. No, not actively. We are centered in Salt Lake County. We do get some business from out.

Q. Referring to the latter part of October and the first part of November of 1942, would you state the approximate number of automobiles that you owned—the Petty Motor Company?

A. Yes. I would like to give a few words of background, if I might.

The Court: You better answer his question and let him develop the background.

By Mr. Romney:

Q. What do you refer to, Mr. Petty?

The Court: No, I won't let you ask a question that way.

Q. Mr. Petty, will you answer the question which I asked you?

A. I had approximately 125 used cars, about 140 new cars and trucks, a total of 265.

Q. At that time were you permitted to sell without restriction your new cars or trucks?

398 A. Yes, sir.

Q. Without any restriction from the government, November of 1942?

A. Oh, no. That was November, 1941.

Q. Was your testimony with respect to the number of cars you owned—did that apply to 1942, October and November, or 1941?

A. That would apply to 1941.

Q. 1942, approximately how many cars—1942, October and November, approximately how many cars did the company own?

A. We had about 120 used, and 135 new, including the trucks.

Q. The new cars that you refer to, did that include your passenger cars and your trucks?

A. Yes.

Mr. Clay: I object to it—not that I care about it—it is just encumbering the record. Some day maybe I might have to read it. I object to it.

Mr. Romney: It is preliminary.

The Court: You can skip it when you find out what it is. I won't put any strict limitation on it as preliminary.

By Mr. Romney: . . .

Q. Will you state the approximate number of new passenger cars and the number of new trucks you had at that time?

A. We had about 65 passenger cars and 70 trucks.

Q. You didn't answer the previous question, as to whether at that time, the latter part of October and the first of November, 1942, you were permitted to sell 399 by the government these cars without restriction?

A. No. The cars were frozen.

Q. What do you mean by that?

A. Everybody ought to know by now what that means.

Mr. Clay: We will all take judicial notice—common knowledge.

By Mr. Romney:

Q. Prior to October 31, 1942, will you state where you were keeping these cars and trucks?

A. You didn't let me tell what I want to tell.

Q. If you will just answer the questions, we will try to develop the story.

Where were the trucks and cars being kept prior to October 31, 1942, immediately prior?

A. Most of my cars were in storage. Most of my passenger cars, not all of them, but practically all of them, and all of the trucks, were out in the open and had been for nearly a year.

Q. I will ask you if you will state what restrictions were placed by the government on the sale of new cars or trucks immediately prior to October 31, 1942?

A. Nothing, immediately prior. But to go back to February—

Q. All right—February of 1942.

A. That is about my starting line. The year 1941 was the largest—

Mr. Clay: Do you think this is within the issue and material?

400 Mr. Romney: Definitely I believe it is.

Mr. Romney: Go ahead, Mr. Petty.

A. (resumed) 1941 was the largest automobile year in all history—

Mr. Clay: I object to that. Let's not go into that.

The Court: Yes—go back to February, 1942. He is asking about restrictions.

A. February, 1941—

By Mr. Romney:

Q. 1942.

A. —1942, we had just completed the largest sale in all history by selling about five million cars. And at that time the government froze the passenger cars, on February 1, 1942—we had two freezes, one what we call the top freeze, where they let you sell them on priority, which amounted to about forty per cent—

Mr. Clay: I object to this as immaterial and irrelevant to any issue in this case.

The Court: Yes, that is far enough.

Now ask another question.

By Mr. Romney:

Q. Was that the condition that prevailed on the 1st of February, 1942?

A. Yes, but that information I was telling is important in this case.

401 Mr. Romney: I am going to let you tell it now, by other questions.

The Witness: The length of time we have to keep them determines the value of this space. If they are frozen we can't sell them—

The Court: Just answer the questions. Counsel will ask you the questions. He will develop it.

By Mr. Romney:

Q. The cars, you say, were frozen as of February of 1942?

A. Yes, sir. They are all frozen. But some were frozen for the following years.

Q. Under government regulations?

A. Yes, sir. Some were frozen for one year, some were frozen for Lord knows how many years.

Q. By that you mean there were limitations placed on the sale of new cars?

A. Yes, sir.

Q. And did the government regulations change after February and before October of 1942 with respect to the sale of new cars and trucks?

A. On new cars there weren't any changes, but new trucks there were.

Q. The 1st of October you say your trucks were not under cover?

A. Didn't have any trucks under cover. Had them out in the open lots, locked up and tires off.

Q. State whether or not in about September, 1942, any new government regulations were issued with respect to the care of new trucks?

A. The important regulation became effective March 1st, when the trucks were frozen.

The Court: Go ahead and ask another question.

By Mr. Romney:

Q. I am asking you if about September or at any time between February of 1942 and October of 1942 any government regulations were issued with respect to the care of new trucks, the housing of them?

A. Yes. After they were frozen in March, then in September an order came out requiring the dealers to put all the trucks into storage.

There is one point I would like to mention—

The Court: You might ask a question.

The Witness: They don't know all the questions to ask.

The Court: You post him during the noon hour.

The Witness: I certainly will.

By Mr. Romney:

Q. Now, Mr. Petty, state what the regulation was that the government issued with respect to the care of the trucks and the housing of them.

A. Well, on March 1st, again, that is my starting line, they wouldn't allow anything for the storage of trucks. On September, about the 1st, they issued an order that all trucks must be placed within doors or must be serviced—four type-written pages of how those trucks must be serviced, 403 which included almost anything you could think of, and gave the ultimatum as October 15th, when these trucks must be indoors. Then it was impossible for the dealers—

The Court: We won't stop to argue about it.

By Mr. Romney:

Q. Now, Mr. Petty, did that regulation of the government provide for any allowance to the dealer for storing and housing these new trucks?

A. Yes, sir.

Q. What was it?

A. Passenger cars had the allowance all the time. The trucks had no allowance from March until when they were placed in storage, but they said, if the trucks are placed in storage we will allow the dealer one per cent a month and make it retroactive from the date they are in storage back to March 1st, amounting to one per cent per month of the factory selling price, which would average about eleven dollars per month per truck.

Q. That allowance was to cover what?

A. It was to cover storage, is the main item, interest, insurance, servicing—perhaps I ought to explain, if you will let me explain servicing I will do so.

Q. I am going to ask you, Mr. Petty, will you tell me, please, whether any segregation was made by the government with respect to what portion of this one per cent was to apply to interest and what portion to servicing and storage?

404 A. No, sir, there was no segregation at all.

Q. As a matter of business, what portion, based on the eleven dollars per truck allowance—what portion did go to pay the interest?

Mr. Clay: Object to it as immaterial.

The Court: If there was no segregation by the government he could not answer that question. Just so he got the money it wouldn't make any difference—the eleven dollars, what they counted it on.

Q. When you received this notification of this regulation of the government for storage of new trucks, what did you do?

The Court: With respect to what?

Q. (completed) With respect to acquiring any space.

The Court: Are you going to get around to renting the premises now?

Mr. Rotaney: That is right, your Honor.

Mr. Clay: He rented these premises, I take it.

By Mr. Romney:

Q. State what efforts you made to acquire premises to store these trucks.

Mr. Clay: Object to it as immaterial.

The Court: The objection may be sustained. I think you better get to the renting and occupation of these particular premises.

By Mr. Romney:

Q. You did acquire premises in which to house the trucks?

A. After due diligent looking everywhere I finally rented these premises.

.405 Mr. Clay: I move it be stricken.

Mr. Romney: One of the elements will be the availability of space at that time.

The Court: That is when they had to move?

Mr. Romney: That was only two weeks after that.

The Court: Let's get him in, and then get him out, then have him tell his troubles.

When did he get in?

By Mr. Romney:

Q. You did rent the premises on West Temple commonly known as the Old Terminal Building.

A. October 26, 1942.

Q. Did you have a written lease at that time?

A. Yes, sir.

Q. With whom?

A. I always have leases, so I got a lease. Here it is.

Mr. Jones: Mr. Lionel Booth, the vice-president of the Galigher Company, must leave this afternoon for North Carolina, but other officials of the company will be available in the event you want them. If you have no objection I would like the court's permission to excuse Mr. Booth so he may go.

Mr. Clay: I have no objection, Mr. Jones. I hope he has a pleasant trip.

The Court: Let the record so show, then.

(Recess to Two P. M.)

Salt Lake City, Utah, Thursday, April 1, 1943: 2:00 P. M.

(After Recess.)

406 CHARLES B. PETTY, the witness on the stand at the hour of recess, was thereupon recalled for further direct examination; and testified as follows:

Direct Examination (Resumed)

(By Mr. Romney:)

Q. Mr. Petty, do you have the lease?

A. Yes, sir.

(Exhibit 9 was thereupon marked by the reporter for identification.)

Q. I hand you what has been marked Exhibit 9, and ask you to examine that and state what it is, please?

A. This is the lease entered into between the Petty Motor Company and Willard B. Richards, Jr., on October 15, 1942, for the renting of a certain basement.

Q. That basement is the basement in the old Terminal Building at 222 South West Temple Street?

A. Yes, sir.

Q. The premises referred to in previous testimony in this case?

A. Yes, sir.

Mr. Romney: Now we offer in evidence, your Honor, the lease.

Mr. Clay: We have no objection to it. I also have no objection if you want to read from it—keep it out of evidence.

407 Mr. Romney: I think we would rather have it in.

Mr. Clay: No objection.

Mr. Romney: We offer in evidence Exhibit 9.

The Court: Any objection?

Mr. Clay: No objection, your Honor.

The Court: May be received.

(Exhibit No. 9, offered and received in evidence, is in words and figures as follows:)

Exhibit 9.

"Salt Lake City Utah, October 15, 1942.

"Mr. Willard B. Richards Jr., Salt Lake City, Utah.

"Dear Mr. Richards: Following our verbal conversation, we make you the following offer:—

"That whereas we have some 135 new automobiles which are frozen and are in need of storage space for said cars as required by the United States Government; and, whereas we estimate that the basement of your building at 222 South West Temple will store some 80 units that we hereby, offer to rent the same for one year, beginning October 31, 1942 and ending October 31, 1943, on the following basis:

4 months @ \$220.00 per month

4 months @ 190.00 per month

4 months @ 150.00 per month

"With an option of another year at \$165.00 per month.

408 "It being understood that you would have to stand all expense to make a suitable entrance to said basement and that we shall have exclusive use of said entire basement for the storing of automobiles, trucks, tires, parts and accessories; that we shall have the right to nail up all doors except one and have a lock on same. It is also understood that we shall have the exclusive use of the following space:

1 room facing West Temple	size 15 x 45
1 room facing West Temple	size 25 x 45

"Because of heavy expense to which you must go to make the entrance to the building and arrange for the storage of our property, we hereby agree to advance you \$440.00 as rent for the months of November and December, 1942.

"Yours truly,

"PETTY MOTOR COMPANY

"By Charles B. Petty" (signed)

"CHAS. B. PETTY

"Witness: KARL KUELL Oct. 26, 1942.

"I hereby accept the above and acknowledge receipt of \$440.00.

"By W. B. RICHARDS, JR."

"Witness: R. PETTY"

409 Mr. Romney: We would like to offer in evidence also, by stipulation if possible, the diagram of the basement mentioned in this lease.

Mr. Clay: No objection.

(Said diagram was thereupon marked by the reporter Exhibit No. 10 for identification.)

The Court: It may be received.

By Mr. Romney:

Q. Referring to the lease, Mr. Petty, it provides that the term of the lease shall be from October 31, 1942, to October 31, 1943. That is your understanding of the term of the lease?

A. Yes, sir.

Q. And contains an option for a renewal for an additional year. Now, the lease provides for payment of rent for the first year—for the first four months of the first year at \$220 per month; the second four months at \$190 per month; and the third four months \$150 per month?

A. Yes, sir.

Q. Have you computed the average rate of rental for the first year?

A. That would average \$186.67 per month.

Q. The provision of the lease is for the second year the rental shall be, if the option is exercised, \$165 per month?

A. Yes, sir.

Q. Now, Mr. Petty, there has been placed on the board a diagram marked Exhibit 10. I ask if you will step down here and state whether or not this truly indicates the premises rented by you under this lease?

A. Yes sir, it does.

410 The Court: Is it drawn to scale?

Mr. Romney: It is drawn to scale. One-eighth inch represents a foot.

Q. Now, do you know who prepared this diagram?

A. No, sir.

Mr. Romney: May it be stipulated this was prepared by the Army Engineers' office?

Mr. Clay: That is right.

Q. Now, Mr. Petty, will you describe the premises, first the dimensions of this basement, the frontage first on West Temple?

A. This is West Temple here, and it is 182 feet from here to here (indicating) 152 this way (indicating). This is west, this is north, this is east, and this is south (indicating).

The Court: Is that inside or outside measurements?

The Witness: That is outside.

By Mr. Romney:

Q. The inside measurement as indicated on the map here is what?

A. 178 feet frontage.

Q. On West Temple?

A. On West Temple. And 148 on Pierpont Avenue.

Q. Those are the inside measurements?

A. Yes, sir.

411 Mr. Romney. Rather than pass the lease to the jury to take their attention, I would like to have permission to read, if I may, the lease. It is short. Because I want to examine the witness with respect to certain phases of it.

It is in the form of a communication from Petty Motor Company, directed to Willard B. Richards, Jr., Salt Lake City, Utah, under date October 15, 1942.

(Reads Exhibit 9.)

Q. Now, Mr. Petty, will you take the pointer, please, and tell the court and jury—describe the premises with respect to the exterior walls of the basement. Were there any windows in the exterior walls?

A. Yes sir, there were about two on the north, and I would say about four on the south or east and two or three on the south, but none on the west.

Q. This refers to the necessity of the owner providing an entrance to the basement. Would you explain if such entrance was provided by the owner?

A. Yes, sir.

Q. Where, in what part of the building was the entrance provided?

A. It was right here (indicating).

Q. How did you get access to the basement?

A. There was already a driveway through the Gra-Cannon Lumber Co.

Q. On the first floor?

A. On the main floor, from Pierpont. And Mr. Richards arranged for us to use their driveway over to this point (indicating).

Q. That is a distance of 86 feet 6 inches shown by
412 the map, is that right?

A. Yes, sir. Then we went down a ramp into the basement, and from here we went—

Q. To other parts of the building?

A. To other parts of the building as we found the space for our equipment.

Q. Was the ramp there prior to the time you leased the property?

A. No, sir.

Q. It was put in there for your special use?

A. Yes, sir.

Q. And arrangements made with the Gray Lumber Company to permit you to go through their building?

A. Yes, sir. They were very nice to us.

Q. Now, Mr. Petty, do you know the measurement of an ordinary Salt Lake City block?

A. 660 feet one way.

Q. Measuring 182 feet average would be more than a quarter of a block, is that right.

A. Yes, sir.

Q. In measurement on West Temple?

A. Yes, sir.

Q. 153 feet deep would be slightly less than a quarter of a block east and west, is that right?

A. I think so. The deed stated seven-tenths of
413 an acre of ground there in the basement.

Q. The lease provides you shall have the exclusive use of the basement. I notice here on the diagram prepared by the government, by the engineering department of the government, a shaded portion, shaded in red.

Will you examine this and indicate, if you know, what that represents?

A. There are three rooms there about fifteen feet and a half wide and fifty feet eight inches long coming onto West Temple.

Q. Those are in the northeast part of the building?

A. Yes, sir.

Q. The fifteen-foot measurement of each of those three is that north-and-south measurement?

A. Yes, sir.

Q. So the three combined would measure approximately forty-five feet?

A. 46½ feet.

Q. East and west. And I think you testified the distance north and south was—or east and west was fifty feet eight inches?

A. Yes, sir.

Q. And the north and south measurement was forty-six and a fraction feet?

A. Yes, sir.

Q. You say there are three rooms there?

A. Yes, sir.

414 Q. Did you hear Mr. Grimsdell of the Grocer Printing Company testify that he was occupying a portion of the basement?

A. No sir, but I learned they were.

Q. What portion of the basement was occupied by him?

A. This one little room right here, fifteen-six by fifty feet eight inches.

Q. Your lease recites you are to have the exclusive use of the entire basement. Did you have any understanding to the contrary with Mr. Richards or otherwise?

A. No, sir. That little room was never mentioned.

Q. Mr. Petty, did you spend any money or go to any expense in the matter of preparing those premises for your use?

A. Very little. Mr. Richards attended to that.

Q. Did you go to any expense in the matter of using the rooms—getting your trucks in?

A. Yes, there was heavy expense to get them in there.

Q. Tell us what was involved, what work was involved, what expense in the matter of taking the trucks in the building.

Mr. Clay: I object to it, if your Honor please. This is another objection, aside from our general objection, because it now goes to the expense of getting in. I think he should be limited to the expense of getting out, if any.

The Court: I think I will agree with you on that.

Mr. Romney: Exception.

Q. Now describe the manner of getting the trucks into the basement, aside from the expense.

415 Mr. Clay: Object to it as immaterial.

The Court: The objection will be overruled.

Mr. Clay: Exception.

A. The getting of the trucks in was a little difficult because the building had a good many pillars in there; evidently had been made very sturdy and strong, and we had to come along here between some pillars and around here where we stored most of them. Stored six in this space, six in that, six in that (indicating). Then we put all we could along here and here (indicating), and we weren't entirely in there when we heard that the government was going to take it. We only had sixty in there. We expected to put in eighty.

Q. Did you actually move sixty trucks in there?

A. We had sixty in there, mostly large trucks, and a few small ones, a few pick-ups, we call them.

Q. That number was in there at the time you were required to vacate the premises?

A. Yes, sir.

Q. When the order of this court was issued on November 11, 1942, you had that number in there?

A. Yes, sir.

Q. The regulations of the government with respect to the storage of these new trucks, did they require anything special with respect to the way they should maintain them?

A. The ruling by the government as referred to here in one of their documents, if you care to see it, is that they must all be serviced.

Q. Are you familiar with the regulation of the government with respect to that matter.

416 A. I am not a mechanic, but I know they required them to be all under cover, and all mounted on blocks so there would be no pressure on the tires, and the tires about one-third deflated, and the oil drained and the gasoline tank empty and the spark plugs out and anti-rust oil all through, and the brake drums loosened, and many things. Took about three pages for them to describe what was to be done.

Q. Did you proceed to service the cars as required by the government in placing them in there

A. They had all been serviced and were out on the open lots down town, and all we did was to get them in there. We towed them from where they were there to the ramp and then we had about eight or ten men to put them in. We would roll them down—most of the building was dirt floor. It took about six or eight men.

Mr. Clay: I think that is objectionable, if your Honor please.

The Court: When you get them in, get them out. That is all you are claiming for having to move.

By Mr. Romney:

Q. You did comply with the government regulations?

A. Yes, sir.

Q. And that required, among other things, that they should be put on blocks?

A. Yes, sir.

417 Mr. Clay: I object to it as needless repetition. He has gone into it and told about it.

The Court: Are you going to try to get the court to let you recover from putting blocks in there?

Mr. Romney: No, your Honor. They removed them from those blocks later.

The Court: When you get to moving them, tell us about the blocks.

By Mr. Romney:

Q. Now, Mr. Petty, the part shaded in red, I think you testified those were rooms; three separate rooms?

A. Yes, sir.

Q. In the lease it refers to a room facing on West Temple 15 by 45. Will you identify that?

A. I had in mind this room here (indicating).

Q. That is the second of the three rooms shown in red?

A. Yes, sir.

Q. With reference to another room which it described at 125 by 45 feet, can you identify that on the map?

A. I would like to change my other evidence. I had in mind the third room and this one over here where the stairway came down.

Q. This on the map states "Raised floor." Was the floor of these three rooms in the northeast corner shown in red raised above the rest of the floor?

A. About three feet elevated, just so we could back a truck up and wheel the parts in from the truck onto the floor.

Q. Each of those was a complete room in itself of
418 the three?

A. Yes, sir.

Q. After putting your sixty trucks in did you have any surplus space in the basement?

Mr. Clay: I object to that as immaterial.

Mr. Romney: It goes to the value of the unexpired term of the lease, the area and the number of trucks that could be stored.

The Court: You don't have to discuss it with counsel. Go ahead and ask the question.

A. That section in there, that we hadn't used at all.

By Mr. Romney:

Q. Which section?

A. Under the Gray-Cannon Lumber Company. That would be the southwest section.

Q. On the map, indicate whether that is the space measuring 86 feet 6 inches over the ramp?

A. Yes, that is the area in general. We didn't have any in here at all (indicating).

Q. What distance east and west would you say that area was?

A. Well, I don't remember. Where we found suitable place, we put some trucks. I think it was about forty-five feet. I wouldn't want to state just where we had them and where we didn't.

I will state, however, there were considerable space that wasn't utilized.

Q. Did you make any computations or do you know the number of trucks which could be stored in that basement?

319 Mr. Clay: I object to it as immaterial, regardless of whether the trucks were there or not, if he had the right to use it, I think that is the only materiality.

The Court: It might have some bearing as to its carrying capacity.

A. Mr. Richards and I went around and measured, and estimated it would handle eighty cars and trucks, but I didn't have them all in there.

Q. Did that include, that area which would be required to accomodate eighty trucks, did that include these two rooms mentioned in the leases?

A. Included one of them, the second one.

Q. Not the other?

A. No sir. The other was going to be used for parts.

Q. I ask you whether either of the rooms mentioned separately in the lease were in fact used by you?

A. No, sir, they were not.

Q. Did you contemplate their use?

A. Yes, sir.

Q. For what purpose?

A. Storing of automobile parts, especially batteries, tires and accessories in general.

Q. You received notice that the government was going to take over the building. Do you remember when that was?

A. I received a summons—the first thing I really knew about it I received a summons to appear in court.

Q. Do you remember the date?

420 Mr. Clay: It is stipulated we were all in court on November 11th. I think you were here.

Mr. Romney: No, I wasn't here.

Q. An order, in any event, was issued by the court, wasn't it, permitting the government to take over the building as of November 11th?

The Court: You can assume that, if that is the fact.

A. They didn't tell us out.

Q. You were given what time to vacate?

A. I think it was the 23rd of November.

Q. And did you in fact vacate?

A. Yes, sir.

Q. When did you complete vacating the premises, Mr. Petty?

A. We were out by the time the court ordered us. The men were there ready to nail us up down below if we weren't out.

Q. You testified this place would accommodate I think eighty trucks?

A. No, I wouldn't say that.

Q. Eighty trucks and cars?

A. Yes, sir—combination. Some spaces that would accommodate a car but wouldn't accommodate a long truck, and we had to use the space to the best advantage possible.

Q. Do you know the height of the basement?

A. The ceiling is—

Mr. Clay: If your Honor please, we hate to object, but I don't think all of this is material. I object to
421 it as immaterial and irrelevant. He has got his lease. He showed what he was entitled to store, eighty cars. I submit all the balance of it is irrelevant.

The Court: He has a right to tell the jury what he got for his lease. He may describe it, if he has not already done so.

The Witness: That is what I would like to do.

Mr. Romney: Will you answer the question.

Q. (repeated) Do you know the height?

A. Yes sir. Fourteen feet from the floor to the ceiling.

Q. In computing that it would accommodate eighty trucks and cars, state whether or not that is on the basis of all of the cars and trucks resting on the floor?

A. It depends on what we put in. If we put all big trucks, likely it would be, unless we took out some more posts.

Q. Could you store more than eighty in it in any other manner?

A. We could easily double-deck them by putting pick-ups on the trucks, because the ceiling was a foot and a half higher—we expected we likely would do some of that. We bring them in from the factory that way.

Q. By doing that can you state the number of cars and trucks that might have been stored there?

A. I didn't figure it. Maybe add another twenty.

Q. Making a total of how many?

A. It would likely hold one hundred.

Q. I am handing you a photograph which has been introduced and marked "D". Will you examine that?

A. Yes, sir.

Q. Does that represent part of the basement?

A. Yes, sir.

Q. And what part of the basement is shown?

A. We had to go through one wall. Mr. Richards put the ramp in where it was to his advantage on account of the cost, and it was to our disadvantage because we had to go through that wall.

Q. That represents apparently the removal of some brick or rock on the sides of the opening?

A. There was an opening there, and we just made it a little wider. You can see the arch there.

Q. That was done for your special benefit and accommodation in the use of the building?

A. Yes, sir.

Q. I am handing you what has been marked Exhibit C. That is also part of the basement?

A. Yes, sir.

Q. And represents the part of the space used by you?

A. Yes, sir.

Q. I notice apparently what would appear to be pipes running along the roof. Can you state what those are?

A. That is the heating plant for the space above.

Q. What service did you get with the building in addition to the use of the building itself? Did you get any other benefits?

A. Perhaps little by-products, would be all.

Q. How was the building heated?

A. We never asked for any heat. Some pipes ran through there that radiated sufficient heat. Anyway, the basement would naturally be warm enough.

Q. Did you get any other service besides heat?

A. There was a night watchman there that gave some protection. But our door was within a door. Our door was locked inside of the Gray-Cannon Lumber Company, so we had double protection.

Q. I notice in the lease it refers to your right to close the windows of the basement. State whether or not you did that?

A. Yes, we just nailed them up.

Q. Why?

A. The element of theft would be lowered by having our property securely locked up.

Q. I am handing you a picture identified as "E" - You will notice a pillar that part of it seems to have been removed, torn away. Would you state if you know whether that was due to deterioration or whether that was specially removed?

A. Due to the fact Mr. Richards put the ramp in where it was to his advantage, it necessitated our turning the trucks half way around to go to the back part of the building, and this pillar was in the way, so he chafed off one corner of it simply so it would give us a little more room for the trucks to go up.

Q. So this pillar, the portion of it which was removed, was removed for your benefit, your use of the basement?

A. Yes, sir.

Q. State whether or not this basement was of any particular advantage to you for the purposes for which you had rented it?

A. It had a number of very decided advantages.

First of all, it was out of the cold, where our property would remain indefinitely in good condition.

And second, it reduced the theft hazard to a minimum. At that time tires were extremely scarce, and there was a good deal of stealing of tires around on the lots, and then if we had insurance, the insurance company would pay only the cost of the tire and wouldn't furnish us with a tire, so we were, we found, with several trucks without any tires. This was ideal in the respect that it was a very, very large place, and only one door, and we didn't have to share it with any one else.

And then it was ideal in another respect, that the fire hazard was at a minimum. It was very close in, within about four blocks of the fire department, had a night watchman,

and the building was very well-built. The walls were very thick and we couldn't find where it had cracked in any way. The building was rough to look at, but it was very solid and it served us extremely well, with the exception of getting the long trucks in and getting them out. We did some extra work in that respect, or on that account.

Q. You have rented other places for the purpose of storing trucks at different times—

425 A. It was more trouble than the average, on account of the pillars down there. But we were putting them in there for we didn't know how long, and that was minor. We would only have to put them in once, and only remove them once. We didn't remove them until the government gave us permission to sell, then we would remove the truck they gave priority on, and that is all we would have to do. It was what we term "dead storage".

Q. In the matter of removing the trucks, did you incur any expense in removing the trucks?

A. Yes.

Mr. Clay: You mean from this location?

Mr. Romney: From this location, when he vacated.

Mr. Clay: This will go in under our general objection, if your Honor please.

The Court: It may be so understood.

A. Yes, sir.

By Mr. Romney:

Q. Would you state to the court what that expense consisted of?

The Court: Have you got it written up?

The Witness: I have it here.

(Exhibit No. 11 was thereupon marked by the reporter, for identification.)

Mr. Romney: We would like to offer it in evidence under the same conditions as the others have offered similar information to the court.

426 Q. I am handing you what has been marked Exhibit 11, and ask you if you will look that over and state what it is, what it represents?

A. Yes, sir, I understand it.

Q. What is it?

A. Well, it is just a statement of the rental, what we agreed to pay and what we were supposed to get and did not get, and the claim we are filing.

Mr. Romney: We offer it in evidence under the same conditions as the others.

The Court: It may be used as a summary for convenience.

By Mr. Romney:

Q. You say you did incur some expense in removing these trucks at the time you vacated, removing them to new locations?

A. Yes, sir.

Q. Will you describe to the court and the jury what that consisted of?

A. These trucks were down there in this deep basement, and were serviced according to the government regulation the plugs were out and the gas out and the oil and this anti-rust oil put all through, the brakes loosened, tires partly inflated, and in order to move them we had to set them down off the blocks and some of them we had to skid around on jacks and push them into a position where we could hitch onto them with a wrecker and bring them out. We would usually pull out about six, park them outside, and then we would proceed to tow them to the new place. We 427 wouldn't put any gas in, or wouldn't run the truck on its own power. The man in the wrecker would do the driving and another man in the truck or pick-up would sit in there and follow him, be towed to the new location. And after we got a reasonable bunch there, of about half a dozen, the crew would go there and put the trucks in the new place, sometimes down in the basement, sometimes up on the mezzanine, sometimes out in a field or some place. We put them in a good many different places. We couldn't get any one large space like this one. We did get one that held thirty-two.

Q. Mr. Petty, in the matter of the expense, you have described what had to be done to remove the trucks. Did you have to reinflate the tires?

A. Generally not. We didn't have much hand pumping to do. We didn't have much expense that way. The chief expense was getting them down and getting them around. They are very heavy trucks, weighing around fifty-five hundred pounds each, and as I stated, it was mostly a gravel floor. It took six men to handle one of them, to get them in shape to pull them out, towing them across the city, then we had to put them back in the other place we found.

Q. Will you state what your total expense in said removal was?

A. The record I kept, we took six men. I paid the foreman \$1.50 an hour. His services amounted to \$1.50 an hour, being \$12 a day. Then we had five other men at one dollar an hour, or eight dollars a day. That would be forty dollars for the five and twelve for the other, be fifty-two dollars.

Then the use of our wrecker and cars I estimated eight dollars a day.

Q. Making a total cost per day of how much?

A. Sixty dollars.

Q. And how many days did it take to remove the trucks to the new locations?

A. They would move an average of ten per day. Took us six days.

Q. And that totaled how much, then?

A. Be six dollars per unit for sixty units, three hundred and sixty dollars.

And we sustained another loss there, we had to take the men out of our shop to do it. We couldn't find labor. We had to take them out, and lose in that way.

Q. You used your own men in moving the trucks, did you?

A. Entirely, yes, sir.

Q. And did you pay them their regular wages only in this work?

A. Just paid them the regular wages, yes, sir.

Q. And the time you have indicated here, the number

of hours mentioned, their time during that time was devoted exclusively to the removing of those trucks?

A. Oh, yes.

There was also considerable time that we didn't count—that is, time spent in finding a place to take them to. I don't know where that would come in.

Q. Who spent that time?

429 A. I spent most of it, and some of my hired men. I haven't figured any bill for that.

Q. How much time do you figure it required on your part to find new places to store the trucks?

A. I would say perhaps five or six days.

Q. When you received notification that you must vacate the premises, did you make immediate effort to procure some new place to store the trucks in?

A. I certainly did.

Q. What effort did you make? What steps did you take?

A. I advertised in the paper. I called up a number of men I knew—especially Mr. Edward Ashton, who is here. And then I canvassed the city from one end to the other, including Murray, the point of the mountain, and I had heard of other dealers finding space in Davis County, so I went up there two different days, went with some of the other dealers and found where they were storing some of theirs up there, and rented a place from them some fourteen miles from here.

I think we spent at least five days—I did—in hunting for those. We have them now in fourteen different localities. We have as low as one unit in one place.

Q. Were you able after all this search and advertising, were you able to find suitable quarters for the storage of cars and trucks?

A. Part of ours are in what I would term suitable; part of them are not, for various reasons. Some of them are out in the field where they have no protection from theft
430 or fire, no watchman at all. We have to go to those trucks once a month and check them over, and its costs considerably more to go to fourteen places than to one place.

Q. When you say "in a field", what do you mean by that? Do you mean out in the open?

A. We have about eight trucks in a building that is in a corner of a field where there are lots of weeds. It is unprotected, unlighted. The windows are constantly being broken out. It is a source of annoyance as to fire and theft. Then it is cold, and the elements are hard on us. Automobiles are highly priced merchandise.

Q. Are these buildings which you were able to get—were they heated?

A. None of them were heated.

Q. Would you say they were less favorable for the storage of your trucks than the quarters at 222 South West Temple?

Mr. Clay: I object to it as needless repetition.

The Court: He can tell what he got. He has already told you about one being in the corner of a field.

A. Another one is in a basement where the water is all on the floor. They are not suitable.

I don't want to put up a tough story. We are getting along all right, only it costs a little more money. We are standing a heavy rap to carry these trucks for the government. That over there was a hard-looking old place, but it certainly was ideal for our set-up; just what we wanted.

Q. Where the water is in the basement, is there any risk there of damage to new trucks or cars stored there?

A. Yes, sir, there is great damage. It seems machinery, if you let it stand idle indefinitely, the elements will start to act upon it. We have had to replace a couple of blocks that became rusted. I have heard of other dealers having to do the same.

Q. As a matter of fact, were you able to find space to store all the sixty trucks other than in your own premises?

A. We have now. We have them all out. But it took some while. We had to let them set around. We didn't have the space for all of them at the time we had to get out. We had to let a few set out. Some we had to move, some passenger cars, and put trucks there. Trucks are much

longer than passenger cars, and most privately owned garages will hold a passenger car but will not hold a truck. And we had a lot of difficulty with those.

Q. This lease provides—I don't think I asked you this—for an option to renew it for one additional year from October 31, 1943, to October 31, 1944. State whether or not it was your intention—whether you would in fact have exercised that option of renewal?

Mr. Clay: I object to it as immaterial, irrelevant, speculative and too remote as an element of damage.

The Court: He had an opportunity by reason of the option. What he would do would depend on the future. And I will sustain that objection. You will have to rest
432 upon the legal right.

Mr. Romney: May we have an exception to that ruling?

Q. Mr. Petty, have you made a computation of the amount of rent which would have become due under the lease for the period of the lease?

A. Yes, sir.

Q. Will you state what—I think you testified the average rental for the first year was \$186.66; is that right?

A. Yes, sir.

Q. For the first year that would amount to how much?

A. \$2,239.92.

Q. The second year provided for \$165 per month rental. Have you computed what that would amount to for the second year?

A. \$1980.

Q. Making a total for the two years of how much?

A. \$4,219.92.

Q. I think you stated that the measurement of this basement was 182 feet by 153 feet. That is right, is it?

A. Yes, sir.

Q. Have you computed the number of square feet within the basement?

A. Yes, sir.

Q. Will you state what that is?

A. 27,846 feet.

Q. And your lease gave you the exclusive possession of the entire area?

433 A. Yes, sir.

I wouldn't want to be unfair with the people occupying that little corner—I really didn't know they were there. Such a big place, we missed it entirely. They are welcome to it, as far as I am concerned.

Q. The little area there I think you stated was fifteen feet six inches by fifty feet eight inches?

A. Yes, sir—765 feet they had.

Q. Square feet?

A. Yes, sir.

Q. Deducting that from the total square foot area leaves how much?

A. 27,181.

Q. So as to that you had the exclusive right in any event?

A. Yes, sir.

Q. You stated 27,181. Is that right, or is it 27,081?

A. 27,081 is right. Ten times as large as this room.

Q. Ten times the area of this room?

A. Yes, sir, that is the space I rented.

Q. From the investigation you made with respect to available space for your purposes, the efforts you made to rent space, what would you say as to the availability of space which could be used for storing of trucks and cars on November 11, 1942?

A. Well, it was extremely scarce. As I stated before, we couldn't find all that we needed.

Q. And that you did find I think you testified was not comparable in its value to you to these premises?

A. With the exception of one. We found one place that was. Found one place better than this.

Q. And it would store how many cars—trucks?

A. Better in one way. It stored thirty-two. But after we had been in there sixty days they moved us out and we had to move all those trucks again.

Q. In that connection, did you incur substantially the same cost of removal that you did in removing them from West Temple?

Mr. Clay: I object to that as immaterial. I hope they don't want us to pay for that, too.

The Court: Maybe the government moved them the second time. Find out who moved them.

By Mr. Romney:

Q. Did you move them?

A. We moved them, yes, sir.

The Court: Who caused him to move them?

By Mr. Romney:

Q. Why did you have to move them from that space?

A. The Tracy Loan Company told me to.

Q. State whether the expense of removal was about as much per truck as it was from the West Temple premises?

Mr. Clay: I object to that.

The Court: Yes, we are not going into that. Can not make the government pay for it but once, if you can make them pay for it then.

435 Q. Mr. Petty, do you know the average cost in Salt Lake City of the dead storage of a truck similar to the ones you stored over here in the West Temple property, per month?

Mr. Clay: I object to that, if your Honor please, as highly speculative, and takes in the whole of Salt Lake City.

The Court: That is a different theory than you have been trying it on.

(Discussion.)

The Court: Let's commence at the other end and find out if he knows what the value of his leasehold over there was.

By Mr. Romney:

Q. Mr. Petty, I will ask you whether from your knowledge of the automobile business, the cost of storage space for trucks, the efforts you made both to secure the premises on West Temple and later the premises to which you moved the cars, you have an opinion as to the reasonable rental value of the premises at 222 South West Temple Street?

A. Yes, sir.

Q. State what your opinion is as to the reasonable rental value of the premises there as of November 11, 1942?

A. It would hold—

Q. I am asking you how much per month.

A. \$303 per month.

The Court: That apparently is based on profit.

436 Mr. Romney: No, your Honor.

The Court: He is going to rent that, and re-rent it to me and everybody else, and charge so much. I think the car storage I pay is six dollars a month. I suppose that is his profit.

Mr. Romney: Wouldn't he be entitled to his profit?

The Court: He is not entitled to any profit under the rule adopted.

By Mr. Romney:

Q. Let me ask you, is that figure based on the theory that you yourself would continue to use the premises?

A. Yes, sir, that is what I arrived at, what it is worth to me.

Q. Are you familiar with the average cost in Salt Lake City of storing trucks per month, dead storage, trucks similar to the ones which you stored in this basement?

Mr. Clay: Will you answer that yes or no.

A. Yes, I am. About one hundred per cent.

Mr. Clay: May the last go out?

The Court: Yes.

A. Yes, sir, I am.

Mr. Romney: Did the court rule on this?

The Court: I said the answer he had given may go over. That's the last I heard of it.

By Mr. Romney:

Q. Mr. Petty, I think you testified that you have been engaged in the automobile business for many years?

A. Yes, sir.

Q. You have been engaged in Salt Lake City in that business since what date?

A. Six years.

Q. Have you had occasion during that six years to rent space for storing trucks and automobiles in Salt Lake City?

A. Yes, sir.

Q. And how extensive has that experience been?

A. Well, I have been renting some of the time for six years various places, and I get information at the weekly dealers' meetings what they are paying, and by direct inquiry.

Q. Do you know what the average cost is per month for storing trucks?

Mr. Clay: Will you answer it yes or no, please.

A. I would have to have the question explained, please
(Last question read.)

The Witness: How many do you include in the average?

By Mr. Romney:

Q. I want to know if you know what the cost is in Salt Lake City for storing trucks—how much per month it costs to store a truck similar to the trucks you had stored at 222 South West Temple.

The Court: He is asking whether you mean trucks, or a truck.

Q. Per truck, how much would it cost per month.

A. Yes, sir, I know the average, the low and the high range.

Q. Will you state what that is?

Mr. Clay: We object as immaterial.

438 The Court: The objection may be sustained. That is not the measure of your damages. The value of your lease there is not to be determined upon what may be the average charge for storing cars. What was his lease worth?

Mr. Romney: This question doesn't go to storing for other people.

The Court: I know it doesn't.

Without asking him these averages, ask him if he knows what his lease was worth—

Mr. Romney: May I have an exception.

The Court: —what was the reasonable value of it as such.

Mr. Clay: He has answered that.

By Mr. Romney:

Q. I think you testified the value of these premises to you was \$303 per month?

A. Yes, sir. I would like to show how I arrived at that.

Q. Will you do that?

Mr. Clay: I object to that as cross-examination. He has answered it. I think he is bound by it for whatever it is worth.

The Court: Maybe his explanation might be of some advantage to the jury, to tell whether it appeals to them or not.

A. Store fifty trucks at \$3.75 each, that is \$187.50; thirty cars at \$2.75, \$82.50. One room for storing other merchandise, \$18, and one room at \$15. That totals up to \$303.

That is how I arrive at the value of this basement to me.

By Mr. Romney:

Q. I refer you now to the schedule of expenses reflecting the damage which you are asking for in this case, Exhibit 11, and ask you to examine it and state whether or not that truly reflects the damages which you have testified to?

A. Yes, sir, it does.

Q. Part of that exhibit reflects the rent for two years at \$303 per month, is that right?

A. Yes, sir.

Q. That totals \$7,272?

A. Yes, sir.

Q. And you have previously testified, I think, that the total contract rate of rent was \$4,219.92 for the two years you were required to pay?

A. Yes, sir.

Q. That leaves \$3,052.08; is that right?

A. Yes, sir.

Q. Then you have deducted from that \$38.77. Will you state what that represents?

A. That was for the ten days I used the building over here, from October 31st to November 11th—one-third of the month, I called it.

Q. You have deducted that from the two years?

A. Yes, sir.

Q. In order to reflect the 23½ months—

A. Yes, sir.

Q. —that the lease had to run after the order was
440 issued for you to vacate it?

A. Yes, sir.

Q. To that you have added \$360 cost of moving the trucks to the new locations, is that right?

A. Yes, sir.

Q. That totals \$3373.31, is that right?

A. Yes, sir.

Q. And that is the amount you have been damaged, or the value of your unexpired lease on these premises, is that right?

A. It is.

Q. I ask you whether you would have been willing to pay \$303 per month for the premises on West Temple Street so leased by you rather than to have had to move to the quarters you now occupy?

Mr. Clay: I object to it as immaterial, argumentative, if your Honor please.

The Court: The objection will be sustained.

Mr. Romney: Exception.

The Court: I will say apparently you are relying upon your legal rights, not any sentiment you might have.

By Mr. Romney:

Q. Would you have been willing to accept less than \$3373.31 as consideration for your right of occupancy of your premises on West Temple?

Mr. Clay: I object to it as immaterial.

The Court: The objection is sustained.

441 Mr. Romney: Exception.

Mr. Romney: You may have the witness.

(Exhibit No. 11, offered and received as a summary of the evidence of Mr. Petty, is in words and figures as follows:)

"Exhibit 11.

"Statement of Damage Suffered by Petty Motor Company by Reason of Being Deprived of Right of Occupancy at 222 South West Temple Street.

"Reasonable rental value of premises for two years at \$303.00 per month	\$7272.00
--	-----------

"Rent contracted for first year October 31, 1942 to October 31, 1943 at average of \$186.66 per month	\$2239.92
---	-----------

"Rent contracted for second year October 31, 1943 to October 31, 1944 at average of \$165.00 per month	\$1980.00
--	-----------

"Total contracted rent for two years of lease	\$4219.92
---	-----------

"Difference between reasonable rental value and rent contracted for two years	\$3052.08
---	-----------

"Less credit for difference in rent for ten days from October 31, 1942 to November 11, 1942	38.77
---	-------

"Balance	\$3013.31
----------	-----------

"Cost of moving sixty trucks from old location to new locations	360.00
---	--------

"Total damage suffered	\$3373.31"
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Cross Examination.

442 (By Mr. Clay:)

Q. In computing this item of \$360, that is the cost of moving sixty trucks from the old location, did I understand you to say your time is included there?

A. No, sir.

Q. Or that it was not included?

A. It was not.

Q. You signed this lease on October 26, 1942, is that right?

A. Yes, sir.

Q. With Mr. Richards. And you moved into the premises on October 31st?

A. Partly.

Q. You got started moving in?

A. Yes, sir, that is right.

Q. Are you related to Mr. Richards in any way?

A. No, sir.

Q. How long had you known him when you entered into this lease?

A. First met him when I moved to Salt Lake in '36.

Q. You had known him since 1936?

A. Yes, sir.

Q. But you are not related to him in any manner?

443 A. No, sir.

Q. I notice in your letter here it said:

"We estimate that the basement of your building, 222 South West Temple Street, will store some eighty units that we hereby offer to rent."

Did Mr. Richards ever represent to you that it would store eighty units?

A. We went and estimated it together.

Q. You and Mr. Richards?

A. Yes, sir.

Q. He is not in the automobile business, is he?

A. No, but he owns quite a bunch of them.

Q. He is not in the automobile business?

A. Only to that extent. He owns perhaps half a dozen.

Q. He runs the Granite Furniture Company, doesn't he?

A. Yes, sir.

Q. And he has some cars he uses in connection with his business?

A. Yes, sir, quite a number of them.

Q. When you took your estimates you just estimated this would hold eighty cars. You never actually stored eighty cars in there?

A. No, we hadn't entirely moved in when we heard the government was going to buy it.

Q. At that time, up until November 10th or 11th, you had, as you say, sixty cars stored there?

A. Yes, sir.

444 Q. When you say you think those premises as of November 11, 1942, were reasonably worth the sum of \$303, you base it upon your statement that it would store fifty trucks, did you say, at \$3.75 each?

A. Yes, sir, or equivalent.

Q. And thirty passenger cars at \$2.75?

A. Yes, sir. That is about the ratio we would put in there. That is how I arrive at that.

Q. And one room you stated at eighteen dollars, and the other at fifteen dollars?

A. Yes, sir.

Q. And that is the basis of your estimate of \$303 per month?

A. Yes, sir, it is.

Q. And as you said before noon, you took a lease before you moved in, and you wouldn't consider occupying any premises without a lease?

A. I am too big a coward. That is, I have always followed that policy. I don't know whether it is right or not.

Q. That is a good policy, isn't it?

A. That is what I have always done.

Q. In making this computation of 27,081 square feet, did that include those pillars in the building, or were they eliminated?

A. They were included. I couldn't remove them.

Q. Of course you could eliminate them on paper, couldn't you?

A. Yes, sir, that is right. But I had a margin there of over fifty per cent to allow for those.

445 Q. What do you mean by that?

A. The space my trucks and cars occupy does not use quite half of the total space. I have it figured here, if you would like to see it.

Q. You mean for eighty cars?

A. Yes, sir. I still have a margin of over fifty per cent for those lovely pillars in there.

Q. What do you estimate eighty cars—what space would they occupy?

A. A truck will require a space eight feet wide, an average of twenty feet long. That is 160 feet per truck. We

put them right close up together, I don't allow any space for going in between, because they will set there. That would be 8,000 feet for those.

Q. You mean 8,000 feet for fifty trucks?

A. Yes, sir.

Then there is thirty cars. They will require seven feet wide by eighteen feet long, or 126 square feet per unit. That is 3,780 feet.

If you will add those together, that is 11,780 feet I would use out of the 27,000, although I should take the two rooms off. By deducting the two rooms from 27,000, it would be 25,541. Taking 11,780 from that, I would have a surplus for those pillars and corners and odd spaces, 14,861 feet. And I would also have a reserve of putting the trucks one on the other, if I wanted to do that.

Q. If I understand this ramp, we will say for example where I am standing facing north represents a driveway through the Gray-Cannon Lumber Company. I understand you drove your trucks in a northerly direction right along their driveway, and when you got to the north end of their premises you cut right through the floor that led down to the basement. Is that right?

A. Generally speaking. We didn't get quite to their north end.

Q. Within a few feet of it?

A. Yes—towards the north end.

Q. Then along this driveway of the Gray-Cannon Lumber Company, to the east of the driveway, was the office of that company?

A. Yes, sir.

Q. To the west of the driveway they had a mezzanine floor and some lumber?

A. They had storage there, all along there. Then to the north they had an elevated room.

Q. Where they also had some furniture stored?

A. That is right.

Q. When you drove your trucks through, you drove them right through the center of the premises of the Gray-Cannon Lumber Company and down in the basement?

A. That is right.

Q. And you took them out the same way?

A. Yes, sir.

Mr. Clay: I think that is all.

Mr. Romney: That is all.

447 C. A. Gore was thereupon called as a witness by and on behalf of the defendants, and having been first duly sworn herein, testified as follows:

Direct Examination.

(By Mr. Romney:)

Q. You have been sworn, haven't you?

A. Yes, sir.

Q. Will you state your name, please?

A. C. A. Gore.

Q. Your address, Mr. Gore?

A. 777 South State.

Q. That is your business address?

A. Yes, sir.

Q. What is your occupation?

A. I am sales manager for the Capitol Chevrolet.

Q. Their place is at 777 South State?

A. That is right.

Q. Salt Lake City?

A. Yes, sir.

Q. How long have you been engaged in the automobile business?

A. Since 1935.

Q. How long with the Capitol Chevrolet Automobile Company?

A. They have been in business since July 1, 1938.

Q. Have you been with them all that time?

A. Since October of 1938.

Q. What position do you hold with the company?

A. Sales manager.

Q. I ask you whether in your business you have had occasion to handle the sales and servicing of trucks?

A. I have.

Q. And passenger cars?

A. I have.

Q. Has that experience been considerable, or little?

A. I would say considerable. We have a very high volume of business.

Q. Have you had occasion during that period of time to move trucks and passenger cars from one location to another?

A. Quite a bit.

Q. Have you had such experience since November 11, 1942—on or about that date did you have any such experience?

A. Yes, we had similar experience to Mr. Petty's at the time cars and trucks were frozen, approximately January 1, 1942.

Q. That necessitated your moving trucks from one location to another? And passenger cars?

A. That is right.

Q. You have heard the testimony of Mr. Petty, have you, with respect to the requirements of moving sixty trucks and automobiles?

A. Yes.

Q. From 222 South West Temple, Salt Lake City, to some fourteen new locations?

A. Yes.

Q. In and about Salt Lake City?

449 A. Yes, sir.

Q. You have heard his testimony as to the cost of removing those trucks? Did you hear that?

A. Yes, sir.

Q. Did you hear his testimony that it cost an average of six dollars per truck?

A. I did.

Q. Making a total of \$360 for moving the sixty trucks?

A. Yes, sir.

Q. I ask you whether in your opinion that was a reasonable expense for moving the trucks?

A. I would say so, yes.

Q. You say you have had to move those cars and trucks about recently?

A. We have.

Q. Had experience similar to that which Mr. Petty has enjoyed, is that right?

A. That's right.

Q. Have you had occasion—did you have occasion on or about the 11th of November to seek storage space for trucks or cars?

A. Yes, we did.

Q. Can you state the availability of such space at about that date in or about Salt Lake City?

A. The availability was very limited. We found many locations very objectionable to trucks, while they would take passenger cars.

450 Q. Do you know of any reason for that condition?

A. Yes, I would say because a long wheel truck base takes space and a half of that of a passenger car. The unusual size of it doesn't permit using all the space a garage might have available for that purpose.

Q. These trucks Mr. Petty testified weighed about 5,500 pounds.

A. That is approximately the weight, yes, of a ton and a half truck.

Q. In addition to their size does the weight have anything to do with it?

A. Yes, very much so.

Q. Why?

A. Because they are bulky to handle, and a truck kept in dead storage under government regulation, it requires moving by hand—floor jacks—they are not near as accessible and movable as a passenger car.

Q. With respect to floors and storage space, any special requirements for the heavy trucks with respect to storage on floors?

A. Yes, I would say if you put any great number of them in the second floor it would require a very substantial structure.

Q. Did you find in your investigation or search any problem of getting them raised to the second floor by elevator?

A. Yes, we had our own experience along those lines. If stored in a basement, have to use an elevator.

Q. The elevators in available space, are they usually big enough to accommodate trucks on elevators?

451 Mr. Clay: I don't see the materiality of this.

➤ The Court: He has asked him the question he had in mind, I think. Now he is fortifying it.

A. From our own experience in that respect, the one we used in connection with the building we were in, by slight alteration was made large enough.

Mr. Romney: It will be similar testimony to Mr. Kipp's.

The Court: Well, then, I think I will say you have used enough expert testimony, used as much as anybody else. I think, and maybe a little more.

Mr. Romney: May we show an offer to testify—or offer this testimony?

The Court: If you say he will testify in substance and effect like Mr. Kipp, I will let that be made of record. We can not undertake to sit here and hear all the expert witnesses you might conclude to call.

466 Mr. Romney: I appreciate that.

We offer this testimony, and state that he would testify similar to Mr. Kipp.

The Court: Substantially?

Mr. Romney: Substantially the same as Mr. Kipp's testimony.

The Court: You can do that if you want to.

Mr. Romney: This is Mr. Edward M. Ashton.

The Court: We won't take time to repeat it. If I let you use half a dozen witnesses, Mr. Clay would have somebody scour around and have half of Salt Lake in here.

Mr. Romney: I take it that stipulation is made, then.

Mr. Clay: I don't like to stipulate anything. But in view of the ruling of the court we will stipulate that Mr. Ashton's testimony would be substantially as Mr. Kipp's if you say so, Mr. Romney.

Mr. Romney: That is right.

Mr. Romney: That is true, Mr. Ashton, isn't it?

The Witness: Essentially so.

The Court: I will expect you to make the same concession tomorrow, when Mr. Clay produces three or four witnesses.

Mr. Romney: We rest, your Honor.

467 LEONARD ADAMS, a witness heretofore duly sworn and examined herein, was thereupon recalled to the stand for further examination herein, and testified further as follows:

Further Direct Examination.

(By Mr. Smith:)

Q. Mr. Adams, on your direct examination you stated a part of your merchandise stock was stored in the space adjoining the property you had formerly occupied, which adjoining space was owned by the Western Newspaper Union?

A. I did.

Q. What is the size of that space?

A. Approximately 10 by 40 feet, or 400 square feet.

Q. What rent did you pay for it?

A. \$20 a month.

Q. Have you paid that rent since?

A. I have.

Q. For how many months?

A. I think it will be five months on the 15th of April; I think the rest is paid up until then.

Q. Will you be through then?

A. We will be through with the space on the 15th of April.

Q. Reference has been made to the ramp that was constructed in your warehouse space there. Were arrangements made to cover that ramp over as soon as these cars were placed in there?

A. We hadn't made any definite plans just how we would cover it, but cars were put in there for dead storage, and we had several ways of covering the ramp so we could use our storage space.

Q. You would be able to use your storage space?

A. Yes.

Mr. Smith: That is all.

Mr. Smith: I desire to advise the court we have concluded not to use Mr. Woodbury.

The Court: Then has everybody rested?

The Court: Then for the defense—for the government.

Mr. Clay: All rested?

The Court: Yes, they have all rested.

Call your witnesses, and let them be sworn together, if you have more than one.

T. E. GADDIS, was thereupon called as a witness by and on behalf of the United States, and having been duly sworn herein, testified as follows:

Direct Examination.

(By Mr. Clay:)

Mr. Jones: Mr. Clay, so far as the defendants represented by me are concerned, to save time I will admit the qualifications of Mr. Gaddis and Mr. Kiepe and Mr. Kimball.

469 Mr. Nelson: I join in that.

The Court: Let's leave that to Mr. Clay. It sometimes happens the jurors want to know the background of a witness.

But don't make it any life history.

Mr. Clay: I will try not to pattern after my adversaries.

Mr. Jones: I have no objection if you pattern after me.

Mr. Clay:

The Court: All I ask is that you use discretion.

By Mr. Clay:

Q. Will you state your name, please?

A. T. E. Gaddis.

Q. You are in the real estate business in Salt Lake City?

A. Yes, sir.

Q. You have been in that business for about how long?

A. Thirty-four years.

Q. In that business what character of property do you handle, and have you handled in the past?

A. General real estate and building, leasing, appraising and so forth.

Q. I assume buying and selling and renting?

A. Yes, sir.

Q. What connection if any do you have with the Real Estate Board?

A. I have been president of the Real Estate Board. I was also chairman of the Appraisal Committee of that board about seven years ago, and I was for fourteen years
470 continuously on the board of directors.

Q. In your business, Mr. Gaddis, do you handle business property?

A. Yes.

Q. Renting and selling it?

A. Renting and selling it.

Q. I will ask you what value in your opinion does a lease have on the value of rental property?

Mr. Jones: I object to that as too vague and indefinite, calling for a conclusion. That would be immaterial here.

The Court: I suppose he means on the market.

Mr. Jones: I don't know just what he meant, your Honor.

By Mr. Clay:

Q. Let me ask you, Mr. Gaddis, not to give a legal definition, but in common language what is meant by lease?

A. A lease is a stipulation between a lessor and lessee for the use of a property for a certain length of time.

Q. At a stipulated price?

A. At a stipulated price.

Q. In your opinion does a lease enhance the value of a tenancy between landlord and tenant?

A. It does.

Mr. Jones: I object to it as too general.

The Court: That is true. What he means, I suppose, is in its marketability, the sale of it, something of that
471 sort.

A. In the permanency of tenancy.

Q. (By Mr. Clay) I mean as to the value of the leasehold.

Mr. Jones: If that is a question, I object to it as too general. I don't know what he has in mind.

Q. I ask you whether you are acquainted with the cost of storing trucks in Salt Lake City, cost per month?

A. The places I have inquired about, yes.

Q. What is that cost?

Mr. Clay: I object to it as immaterial.

The Court: The objection may be sustained.

Mr. Romney: Exception.

Q. Have you ever examined the premises which the Petty Motor Company occupied at 222 South West Temple?

A. No, I haven't.

Cross Examination.

(By Mr. Clay:)

Q. When you say you have had similar experience, do you mean you had to vacate some premises in Salt Lake?

A. Yes, several.

Q. By having similar experience, were you referring to the fact that the sale of automobiles had been frozen? When you say you had similar experience to Mr. Petty, were you having reference to the fact that some of your cars also had been frozen by the government?

452 A. All of them—all of our new cars and trucks, yes.

Q. Because of that was it necessary for you to find some additional storage space?

A. Yes, sir.

Q. And when you say that you think the sum of \$303 a month was reasonable, that is based upon storage charges as you found them to be, is that right?

A. I don't think I testified to that question, sir. I testified as to the cost of moving them.

Q. I am sorry—you are right. You testified as to the six dollars per car for moving them?

A. Yes.

Q. Of course that would depend upon how far they were removed, wouldn't it?

A. That's right.

Q. If you moved a car maybe just across the street from the old location, it naturally would be much less than if you moved it twenty or thirty blocks?

A. Very true.

Q. Do you ordinarily tie two or three together and tow them?

A. Just one.

Q. That is, one car would tow another car?

A. Yes, sir.

Q. And run on its own rubber, but not on its own power?

A. That is right.

Mr. Clay: That is all.

453 H. P. KIPP was thereupon called as a witness by and on behalf of the defendant Petty Motor Company, and having been first duly sworn herein, testified as follows:

Direct Examination.

(By Mr. Romney:)

Q. Please state your name.

A. H. P. Kipp.

Q. Your address?

A. 1348 Sunnyside Avenue.

Q. Your occupation?

A. Manager, property management department, Tracy Loan & Trust Company.

Q. What are your duties in that capacity?

A. Renting, leasing and general supervision of properties, income properties mostly.

Q. You have charge of all such activities for the Tracy Loan & Trust Company?

A. All except those that are in receivership or in the estates.

Q. That is the major portion of them that you supervise?

A. That's right.

Q. How long have you held that position?

A. About eight years.

Q. Prior to that what was your occupation?

A. Worked for Tracy Loan & Trust Company for fifteen years in the management of properties, but not in charge of this particular department.

454 Q. So for the past twenty-three years you have been engaged in the business of property management?

A. I would say about twenty years altogether.

Q. I ask you, Mr. Kipp, whether you hold any degree in connection with property management work from any national institution?

A. I am a member of the Property Managers' Institute of the National Real Estate Boards.

Q. That is a national organization?

A. Yes, sir.

Q. Do you know how many people in Utah belong to that organization?

A. Two.

Q. Is the other member Mr. F. Orin Woodbury?

A. Yes.

Q. Are there any ethical requirements imposed upon you as a member of that organization?

A. There certainly are.

Q. Those have to do with your work in property management?

A. An absolute requirement, all property must be handled beyond any question as to honesty, integrity and so forth.

Q. Now, have you held or do you hold any position with the Real Estate Board of Salt Lake City or of Utah?

A. I am a member of the Board of Directors, the Real Estate Board.

Q. How long have you been such?

455 A. This is my second term, yearly term.

Q. The Department House Association, are you connected with that?

A. I am a past president of the Association, and present director.

Q. Are you able to estimate the approximate percentage of business properties which are being managed for other people by trust companies, banks, in Salt Lake City, which Tracy Loan & Trust acts as manager for?

Mr. Clay: I object to it as immaterial.

The Court: What is the purpose of it?

Mr. Romney: To show the experience of this man in property management.

The Court: Property being managed for other people wouldn't make any difference. You can show what he has been doing.

Mr. Romney: Exemption.

Q. The Tracy Loan & Trust Company do manage a great number of properties, do they?

A. They do.

Q. You have direct charge of that?

A. I do.

Q. Do you have any estimate of the number of such properties?

Mr. Clay: I object to it as immaterial.

A. We claim we manage more properties for other people than any other company in Salt Lake City.

The Court: That may go out. That doesn't mean anything.

456 By Mr. Romney:

Q. Have you any estimate at all of the number of such properties?

A. You mean everything—houses and apartments?

Q. No, confine it to business properties.

A. Possibly fifty or more.

Q. State whether or not you represent both the tenants and the landlord in such rental matters?

A. We do.

Q. Can you name any of the properties which you have managed in Salt Lake City?

A. We manage the property known as the Central Building on Second South and Main, occupied principally by the Politz Candy Company; the I X L Building, occupied on the ground floor by the Success Markets; the buildings on Fourth South west of the Newhouse, with the exception of the part occupied by the Success Tire and Rim Company; the building in the rear known as the Service Garage, the portion just directly south of the Newhouse, occupied by the Auto Supply.

We formerly managed the property known as 350 South West Temple.

We have a number of small properties on First South and West Temple, and various other small business locations in the city.

Q. Do you manage at present any properties on West Temple street?

A. Some.

457 Q. Could you name those?

A. Some small properties just south of First South on West Temple. I believe that is all at the present time.

Q. In the past have you managed any such properties on West Temple?

A. Yes.

Q. Are you acquainted with rental values near 222 South West Temple?

A. I am.

Q. Have you had occasion to appraise properties in that general vicinity?

A. For rental?

Q. For rental properties.

A. Yes, I have.

Q. Are you acquainted with the premises at 222 South West Temple?

A. I am.

Q. Commonly known as the old Terminal Building?

A. Yes.

Q. Have you ever had anything to do with those premises in a business way?

A. I have inspected them from time to time. Our company was receiver for the property at one time.

Q. So you are familiar from personal knowledge with the premises?

A. I am.

Q. Are you familiar with the rental of properties in the general vicinity of that property?

458 A. I am.

Q. Referring particularly to the basement of that property, are you familiar with those particular premises?

A. I am.

Q. Have you recently inspected those premises?

A. I did several days ago.

Q. I ask you whether you are able to state the reasonable rental value of the premises previously occupied by the Petty Motor Company as of November 11, 1942, 222 South West Temple?

A. I am.

Q. What is the reasonable value?

Mr. Clay: I object to that, if your Honor please, I think it goes in under our general objection.

The Court: You offer it as to the value of the lease?

Mr. Romney: The value of the lease, the unexpired term.

The Court: He may answer.

A. 182 by 153 feet, I arrived at the total square footage of 27,846 square feet. Deduct from that the portion occupied by the Grocer Printing Company in the basement, which I figured at 15 by 51 feet approximately, or 765 square feet. Leaving net amount that Mr. Petty had the use of 27,081 square feet.

In my judgment that was worth fifteen cents per square foot per year.

459. Q. Amounting to how much?

A. It came to a total of \$4,062.15, or a monthly rental of \$338.51.

Q. Did you make any investigation with respect to the availability of space which might be rented and utilized for storing automobiles and trucks shortly before or about November 11, 1942?

A. I did.

Q. Have you made investigation since that date?

A. I have. We have a great number of calls for space.

Q. I ask you whether you can state what the condition is with respect to the availability of such space?

A. Such space for truck storage is practically nil.

Q. How long has that condition existed approximately?

A. I would say for six to eight months at least.

Q. Can you state why that shortage exists?

Mr. Clay: I object to that as immaterial.

The Court: Yes. Let Mr. Clay ask him.

By Mr. Romney:

Q. Mr. Kipp, state whether or not Mr. Petty appealed to you for assistance in finding new quarters in which to store the trucks which had to be removed from this old Terminal Building?

Mr. Clay: I object to it as immaterial, if your Honor please.

The Court: I believe he said he did, but he may confirm it.

A. He did.

460 Q. Did you take any steps to assist him?

A. I did.

Mr. Clay: I object to that as immaterial, if your Honor please.

The Court: This is for the purpose of proving how difficult it was, why he had to scatter his storage trucks around one place and another.

By Mr. Romney:

Q. With what result?

A. I was able to find one space for him, at 940 South Main Street. I think Mr. Petty said he put about thirty cars in there. I didn't check that.

The Court: He said thirty-two.

A. I didn't ever check it, myself.

Q. Do you know whether he was able to get a lease on that?

A. He was not.

Q. Had to go in on a month to month basis?

A. Practically a day to day basis.

Q. And do you know how long he was able to remain in those premises?

A. I think it was approximately sixty days.

Q. Then do you know what happened, whether he was compelled to move?

A. The property was leased on a long-term lease. It was necessary for him to move.

Q. Do you know how much notice he had to move?

A. I think we were able to give him ten days.

461 Q. Did you visit other locations and make further efforts to acquire space for Mr. Petty?

A. When do you mean?

Q. At the time he was compelled to move from these premises on West Temple.

A. Yes, I canvassed pretty thoroughly along with many others who called me, so I had information that others were also looking.

Q. In what area did you make this investigation?

A. It wasn't confined to any particular area—just anything that would take care of him.

Q. Anywhere in Salt Lake City?

A. Anywhere in Salt Lake City.

Q. Were you able to find further space?

A. Not at that time.

Q. What would you state with respect to the desirability of the space in the old Terminal Building which was used by him for the purpose for which he was using it?

A. I would say it was ideal.

Q. Why do you say that?

A. It was dry, it was safe, had only one entrance, had the benefit of watchman's service, the building more or less had some heat because of the balance of it being heated, and had all the space in one place, all he required.

Q. What in your opinion would be the relative cost of doing business, having it all in one location, such as the old Terminal Building, as against having it in fourteen different places, storing the same number of cars?

462 A. I would say it would be very much less. Always more expensive to do business in many locations rather than one.

Q. Do you know the length of an ordinary truck?

A. I do.

Q. What is it?

A. Between twenty and twenty-two feet.

Q. And the weight of a truck?

A. I was informed from other independent sources they average between five and six thousand pounds for a ton and a-half truck.

Q. I ask you whether in the matter of procuring space for storage for trucks that presents any particular trouble?

A. It does. It takes a very substantial floor to hold that much weight in any quantity.

Q. I ask you whether in many cases you find buildings otherwise available which are not well enough constructed to support such weight?

A. That is absolutely true.

Q. Whether you find other buildings that will not permit of ingress and egress of such trucks into the building?

Mr. Clay: I think that is objectionable.

The Court: I think so. You have already gone into it.

that it was very difficult to find a suitable place to store trucks. If you undertake to prove negatives, we will never get through.

Mr. Romney: You may have the witness.

Cross Examination.

463 (By Mr. Clay:)

Q. Would you say the reasonable rental value of those premises amounted to \$338 per month on October 26, 1942?

A. For Mr. Petty's purpose, I would say yes.

Q. For any purpose?

A. For any purpose.

Q. That would be fifteen cents per square foot per annum?

A. That's right.

Q. So you think that Mr. Richards just sort of got the worst of that transaction?

A. No, I wouldn't say that. He had his reasons for making his lease, undoubtedly.

Q. If perhaps he had had Tracy Loan and Trust Company represent him, maybe they could have gotten him a better lease, is that right?

A. I wouldn't say that, either.

Q. You don't know if he had any particular purpose in leasing the premises to Petty, do you?

A. Except to increase his rental from his building, I presume.

Q. If he could have gotten \$338 a month, it is reasonable to believe that he would have charged that much, isn't it?

A. I can't answer it that way. The basement had been vacant for a long time, that will have to be taken into consideration.

Q. Been idle for many years, hadn't it?

A. There is a reason for that, too.

Q. Regardless of the reason, it was a fact, wasn't it?

A. It was a fact.

Q. Do you have any knowledge what the tenants
464 upstairs were paying?

A. I didn't investigate that.

Q. If the basement is worth fifteen cents per square foot, what in your opinion would be the value of the premises on the main floor?

Mr. Jones: I object to that, your Honor, unless he is testing his qualifications. Object to it as direct evidence, as far as we are concerned, the tenants on the first floor.

Mr. Clay: Testing his credibility.

The Court: Yes, but you are injecting into it these other cases:

I will let you use him as your witness a little bit later on. On cross-examination it would not be fair to these other parties who are on that floor.

By Mr. Clay:

Q. The amount he was paying to Mr. Richards under this lease at the rate of \$186 a month was less than one cent per square foot, wasn't it?

A. That's right.

Q. You think it was worth fifteen cents a square foot, or fifteen times what the lease called for?

A. No; you are talking about the monthly rental. I am talking about annual rental. I said a cent and a quarter per month—fifteen cents per year.

Mr. Clay: I think that is right. I am mistaken on that. I am talking of the monthly basis.

465 The Witness: I am talking of the yearly basis. Leases are usually quoted on a yearly basis.

By Mr. Clay:

Q. So that the amount provided for in the lease was a little less than twelve cents a square foot. You figured on fifteen?

A. That's right.

Mr. Clay: I think that is all.

Mr. Romney: That is all, Mr. Kipp.

E. M. ASHTON, was thereupon called as a witness by and on behalf of the defendant Petty Motor Company, and having been first duly sworn herein, testified as follows:

The Court: What are you calling him for?

The Court: Mr. Gaddis understands. It means, if a property gets on the market through a lease and there is a lease to be bought or sold, whether its term would make a difference in its value as to the right of occupancy.

By Mr. Clay:

Q. As to the right of occupancy and the value of a leasehold in case of a sale of the premises—I mean in case of a sale of the tenancy.

A. From the tenant's standpoint it has very material value.

Q. Can you elaborate on that?

A. I can elaborate in this way, if a man has a business for sale and wants to sell it, generally the first question asked is, What kind of lease have you, how long can you stay there—permanency of occupancy of that business. If it has a good lease on it it adds to the value of the property, the salability of it.

Q. And if there is no such lease, and only month-to-month tenancy?

A. That question is always taken into consideration, I think.

Q. Would it affect the marketability of that business?

A. That is my opinion, yes.

Q. I would like to have you express your opinion
472 if such a tenancy, month-to-month tenancy, has any value at all on the market?

Mr. Jones: I object to that as not the subject of expert testimony; clearly could not be; so many elements enter into it, the relationship between landlord and tenant, the kind of premises, the kind of business.

The Court: I think that is true. I presume the witness will probably elaborate on it. Depends on the property, too, whether the property was for sale or whether it was not; whether the rental was commensurate with the rental that was usually being paid in that neighborhood.

By Mr. Clay:

Q. You have stated that in the sale of any business that whether or not there is a lease is a very material consideration in the transaction?

A. Yes, sir.

Q. I will ask you if you are familiar with the premises known as the Terminal Building at 222 South West Temple?

A. Yes.

Q. How long have you known that building?

A. Thirty-four years. I was in the old Commercial Club Building at the meetings when they were there about 1909. I have had occasion to be in there many times since.

Q. Do you have an opinion about how old that building is?

A. No. It is my impression it is around fifty years old.

Q. Has the building been kept up, as time has elapsed, been kept in good condition, do you know?

473 A. I don't think so.

Mr. Jones: Do you know, Mr. Gaddis?

The Witness: Yes, I know.

By Mr. Clay:

Q. Is it your answer that you don't think it has been kept up?

A. I know it has not, from my impression of the property.

Q. Do you know whether or not that building has been on the market for sale in recent years?

A. Yes.

Q. Do you know how frequently?

A. I believe it has been continuously on the market since 1935, and before that, up to the time Mr. Richards bought it.

Q. Do you know the premises that were occupied by the Grocer Printing Company at 212 and '14 South on West Temple?

A. Yes.

Q. I will ask you, Mr. Gaddis, if in your opinion eighty dollars a month was a reasonable rental for those premises as of November 11, 1942?

A. I would say it was.

Q. Do you know the premises occupied by the Independent Pneumatic Tool Company at 216 South on West Temple?

A. Yes.

Q. And in your opinion were those premises of the rea-

sonable value of forty-five dollars a month as of November 11, 1942?

A. They were.

Q. Do you know the premises occupied by the Chicago Flexible Shaft Company?

474 A. Yes.

Q. 224 South on West Temple?

A. Yes.

Q. In your opinion were those premises of the reasonable value of one hundred dollars a month?

A. They were.

Q. Going back to the Grocer Printing Company, would you say that those premises were worth any more than that amount as of that date?

A. No, I would not, on a month-to-month tenancy I think that would be all right.

Q. How about the Chicago Flexible Shaft Company?

A. I think the rent was reasonable there.

Q. Do you know the location of the Galigher Machinery Company, 228 South West Temple?

A. Yes.

Q. Would you say that those premises were worth in excess of \$150 a month?

A. No, I would say it was worth \$150 a month.

Q. Do you know the premises occupied by the Gray-Cannon Lumber Company?

A. Yes.

Q. On those premises, Mr. Gaddis, that corporation was paying for a time \$115 a month, and shortly before they vacated the premises the landlord granted to the Petty Motor Company a right to make an entrance through the premises, going right through the center of the Gray-
475 Cannon Lumber Company, and cut a ramp leading from the main floor of the Gray-Cannon Lumber Company down to the basement.

Before I ask you your opinion as to the reasonable value of the premises, I would like to get your opinion as to whether or not the granting of that easement to the Petty Motor Company and constructing of that ramp would depreciate the value of the use of those premises, in your judgment?

Mr. Smith: I object to the question as being incompetent.

for the reason it does not state the full facts with reference to the ramp, the use to be made of it. It also presupposes the landlord granted the premises without taking into consideration that the tenant also consented to it.

The Court: What are you trying to find out?

Mr. Clay: Whether or not that right to drive cars through there and down the ramp would depreciate the market value of those premises.

The Court: Of which tenant?

Mr. Clay: Gray-Cannon Lumber Company.

Mr. Smith: It is my thought until he shows the extent to which that use is to be made that the question is incompetent in this form.

The Court: Are you dealing with the rent being paid by the Lumber Company?

Mr. Clay: Yes, your Honor.

The Court: Don't ask a leading question whether it depreciated it or not. You are asking him a leading question.

476 By Mr. Clay:

Q. Let me ask you, Mr. Gaddis, you know the premises occupied by the Gray-Cannon Lumber Company?

A. Yes.

Q. In your opinion, before that ramp was built—

Let me ask you this—did you hear the testimony in court of Mr. Adams of the lumber company?

A. I did.

The Court: Maybe he has been down there and has seen that ramp.

The Witness: I saw it last November.

By Mr. Clay:

Q. Let me ask you, having in mind those premises before the ramp was built, would they be worth in your judgment the reasonable value of \$115 a month?

Mr. Smith: Object to that as leading.

The Court: Yes, it is leading.

By Mr. Clay:

Q. What, in your opinion, was the reasonable value of those premises as of November 11, 1942?

A. Gray-Cannon Lumber Company?

Q. Yes.

A. I thought that was worth one hundred dollars a month. There is a ramp and a right-of-way going through to the basement there; assuming they will be taking cars and trucks out of the basement from time to time, the right-of-way is worth something, the easement there.

477 If the building was put at \$115 a month, I think the tenant should be allowed credit of \$15 a month for allowing that easement. I don't think his property, vacant, would rent for more than \$100 a month, with that easement through his building.

Q. Your testimony now relates to November 11, 1942?

A. Yes.

Q. Are you familiar with the premises occupied by the Petty Motor Company in the basement of this building?

A. Yes, sir.

Q. What, in your judgment, Mr. Gaddis, was the reasonable value of those premises, reasonable rental value of those premises, as of November 11, 1942?

A. I think that property was worth the face value of the lease, \$186 a month.

Q. Do you think it was worth any more than that?

A. No, sir.

Q. Let me ask you, Mr. Gaddis, do you know where the premises are now occupied by the Galigher Company—I mean on Motor Avenue, the new location?

A. Yes, I have looked the premises over where they are now.

Mr. Clay: I think I have not covered all the old tenants yet. Let me go back to that.

The Court: I think you omitted one.

Mr. Clay: Yes, I did.

Q. Are you familiar with the premises that were occupied by Mr. Brockbank on the second floor of the Terminal Building?

A. Yes, sir. I looked it over in November.

478 Q. And were you in court during Mr. Brockbank's testimony about those premises?

A. Yes, sir.

Q. What, in your opinion, was the reasonable value of the premises occupied by Mr. Brockbank as of November 11, 1942?

A. I think \$22.50 a month is a reasonable rent of those rooms.

Q. Would you say those premises are worth any more than that amount as of that date?

A. I would not.

Q. I think I asked you about the Independent Pneumatic Tool Company?

A. Yes.

Q. Is that right?

A. Yes.

Q. And the Chicago Flexible Shaft?

A. Yes.

Mr. Jones: You didn't ask him if it was worth any more.

By Mr. Clay:

Q. On the Independent Tool Company I am not sure that I asked you the reasonable value of these premises. Did I?

A. I think you did. Forty-five dollars a month. I believe you asked me, and I told you I thought forty-five dollars was a reasonable rent for the premises.

Mr. Clay: I think he had a lease down there, or claimed to have a lease. Where is that lease?

479 Mr. Jones: Do you dispute he had a lease?

Mr. Clay: Yes, sir.

Mr. Jones: I assumed you had admitted—

Mr. Clay: I haven't admitted anything of the kind.

Mr. Jones: We will have to put them in evidence then, your Honor, encumber the record with those. I thought we had gotten past that.

By Mr. Clay:

Q. Mr. Gaddis, the Independent Pneumatic Tool Company claimed to have had a lease down there dated December 1, 1942, or rather, commencing as of that date, and ending November 30, 1947, which provided for a rental of forty-five dollars from December 1, 1942, to November 30, 1945, and for fifty dollars a month from December 1, 1945, to November 30, 1947.

I will ask you if in your opinion that is the reasonable value of the premises, to-wit, forty-five dollars a month from December 1, 1942, to November 30, 1945?

A. I think it is.

Q. Would you say it is worth any more than that amount?

A. I would not.

Q. I will ask you if, in your opinion, those premises were worth fifty dollars a month from December 1, 1945, to November 30, 1947, under the lease?

A. Yes, I think that would be all right. It is the tendency of a landlord over a long period of lease to increase the rental some.

Q. Would you say that the premises were worth
480 any more than or any less than that amount from December 1, 1945, to November, 1947?

A. No, I think that is all right.

Q. Directing your attention to the Galigher Company, who I think are located on Motor Avenue at Second East, have you been on those premises?

A. I have.

Mr. Clay: Does the Galigher Company claim they have a lease there?

Mr. Jones: They don't claim it; they have.

Mr. Clay: Would you mind giving me the term of the lease?

Mr. Jones: I had it the other day and showed it to you.
Mr. Clay.

Mr. Clay: I put it down, but I can't find it.

Mr. Jones: I hand you now the lease. You can do with it as you please.

Mr. Jones: You are disputing that the Independent Pneumatic Tool Company had a lease?

Mr. Clay: I have always disputed it.

Mr. Jones: The first time I heard of it.

By Mr. Clay:

Q. It is contended, Mr. Gaddis, that the Galigher Company on their new location have a lease running from January 2, 1943, to January 1, 1944, at a rental of two hundred dollars per month. Do you have a judgment as to whether or not that is a reasonable sum for those premises under a one-year lease?

A. Two hundred dollars a month—I have examined the premises, and I think it is reasonable.

Q. Reasonable rental?

A. Yes.

Q. Calling your attention to the Independent Pneumatic Tool Company, I think that they are located at No. 54 East on Fourth South. Do you know where those premises are?

A. Yes. I have examined the premises.

Q. I believe it is contended that at that location the tool company has entered into a five-year lease commencing December 4, 1943, and ending November 30, 1947, at a rental of fifty dollars a month—fifty dollars a month I believe for the first year.

Do you have a judgment as to the reasonable rental value of those premises?

A. Yes. I think forty-five dollars a month to November 30, 1945, and fifty dollars for the balance of the lease is a very reasonable rent for that store; good retail location.

Q. Calling your attention to the premises now occupied by Mr. Brockbank up on First South, at No. 50 West First South Street, upon a lease of sixty-five dollars for the first six months and seventy-five dollars for the remainder of the six months for the period of a year—that is to say, sixty-five dollars a month for the first six months and seventy-five dollars a month for the second six months.

A. I have examined those premises, and I think the rental of seventy-five dollars a month is reasonable there.

Mr. Clay: You may cross-examine.

Cross Examination.

(By Mr. Jones:)

(Exhibit No. 12 and 13. was thereupon marked by the reporter for identification.)

Mr. Jones: Inasmuch, your Honor, as we have examined on this at length, I offer in evidence Exhibits 12 and 13, being the documents upon which Mr. Baird was examined and cross-examined at length as his lease in the Terminal Building; Exhibit 12 being designated as being made as of the 24th of October, 1939, and Exhibit 13 bearing the designation of July 6, 1942, which he has testified to was approved and ratified on August 10, 1942.

We offer those in evidence.

The Court: Whose lease is it?

Mr. Jones: That is the Baird-Independent Pneumatic Tool Company.

The Court: Any objection?

Mr. Clay: I have no objection to Exhibit 12—wait just a minute.

The Court: Object to both of them, and we will talk about it later.

Mr. Clay: I will object to both of them. I have a reason on this one particularly. I will object to both of them, and state my reasons later.

The Court: I will overrule the objection until I find out you are right about it.

483 Mr. Clay: Exception.

The Court: They may be received.

By Mr. Jones:

Q. Mr. Gaddis, I think inadvertently some error may have been made on examining you on the new lease of the Independent Pneumatic Tool Company, that is, for the property over here on 54 East Fourth South.

That lease provides for a rental of fifty dollars a month for the first year and sixty dollars a month for the next four

years, and the lease runs from the 1st day of December, 1942, to the 30th day of November, 1947.

You testified that the new lease was reasonable at forty-five dollars a month for the first year, fifty dollars a month for the second year. Those are not the terms of the new lease.

What about the actual terms of fifty dollars a month for the first year and sixty dollars a month for the next four years?

A. My impression was fifty dollars a month was cheap for that property. I think the property probably would be worth sixty dollars on that lease.

Q. Where they are now?

A. Yes, sir.

Q. And would your same reasoning apply as you gave to the lease they had in the old building, that that was reasonable because it was the tendency of a landlord under a written lease to raise the amount as the time went on?

484 A. I would say the rental of the old place was reasonable, yes.

Q. I want you to get my question as I asked it, Mr. Gaddis.

You testified on direct examination that the old rent was reasonable where it went from forty-five dollars a month to fifty dollars—as I understood your answer was that was reasonable because it was the tendency of a landlord under a written lease to raise the rent as the period progressed?

A. Yes, after two years.

Q. And that is why it is reasonable?

A. Yes.

Q. And that is why this is reasonable, because of the same tendency?

A. Yes.

Q. So it is to the tenant's disadvantage—if he can remain for eighteen to twenty-six years at the same rent without a written lease, it is to his disadvantage to have a written lease, because the tendency of the landlord is to raise the rent after the first two years under a written lease?

A. It all depends on the landlord.

Q. That is what we come down to in the value of any

tenancy, isn't it—it is the relationship between the tenant and the landlord?

A. Yes, sir.

Q. So in testifying that a written lease is a valuable thing, it may be a valuable thing, and it may be a liability, may it not?

A. In times of depression it may be a liability. As a rule it is certainty of staying in a certain spot a certain time, it is business insurance, in my opinion.

Q. Where a tenant and a landlord, even a succession of landlords for a period of eighteen to twenty-six years, have gotten along and the landlord wants the tenants and the tenant wants to stay there, there is not any reason why a lease should be required, is there?

A. Where a property is for sale I believe it is advisable to have a lease.

Q. That is your judgment?

A. To protect yourself—from the tenants standpoint.

Q. That is your judgment?

A. That is my judgment.

Q. And that would be particularly true if property was readily rentable?

A. More so.

Q. And where the property is peculiarly suitable for the purpose of the encumbent tenant, for no one else, and the landlord is satisfied with him and he is satisfied to stay, that rule would not hold good, in your judgment?

A. That is right.

Q. You said, "That is right." Do you remember when this court used to be held in the Dooly Block and the Post Office was over there?

A. A little before my time. My time starts in 1909.

486 Mr. Jones: I only know of it by hearsay, myself. I was wondering if you knew of it.

The Witness: No.

Q. Let's assume, then. You do know of it historically, don't you?

A. I have heard the post office used to be over there.

Q. Assume this court used to be in the Dooly Block, right next door to this Terminal Building, and that the post office was there, and a lot of lawyers had their offices

there, and then assume they had five or ten-year leases. You would say that was an asset to them, wouldn't you?

A. It would be.

Q. Then this building was constructed and the Newhouse and Boston Buildings, and the court and post office moved down here and the lawyers have got to stay up there and their brethren that didn't have leases came down here.

Was that lease still an asset to them, in the Dooly Block?

Mr. Clay: I object to that as argumentative.

(Discussion.)

The Court: If the witness has any light to throw on your question he can do so.

Mr. Jones: I would like to see if Mr. Gaddis has any light on that.

The Court: It is a business proposition, depending upon conditions.

487 By Mr. Jones:

Q. Would you think those long-term leases would be valuable to the tenants after the court and the post office and the business has moved away, gone away from that district?

A. I would say a one-year lease or two- or three-year lease might be valuable, very valuable.

Q. If they had to remain there?

A. A ten-year lease would sometimes work the other way.

Q. If they had to stay there a year or two or three after the courts and the post office and the business moved away from the building?

A. Then it might be a liability.

Q. It may be valuable from the landlord's point of view to get a tenant on a lease and to the disadvantage of the tenant to be on one, mightn't it?

Let's go back to 1929. You remember those years?

A. Yes, sir.

Q. A booming year up to the fall?

A. Yes.

Q. If some tenants signed a five-year lease in July of

that year at the prevailing rates in the ordinary business property they would have been at a distinct disadvantage on the first of the following year, wouldn't they?

A. They would have.

Q. It would have been distinctly to the tenant's disadvantage to have a written lease that he couldn't get out of?

A. That's right.

Q. If in 1938 tenants had had a five-year lease
488 at the then prevailing rates, the landlord would have been at a distinct disadvantage as the rates went up, as they did, wouldn't he?

A. That is true.

Q. So it depends on the circumstances in each individual case whether it is an advantage or a disadvantage; isn't that true?

A. Yes, that is true.

Q. Your figures, Mr. Gaddis, on the reasonable rental value were what the vacant space is worth?

A. In reference to which store?

Q. Either one of them.

A. That is right.

Q. Just the vacant space?

A. Yes, plus heat, plus the utilities offered.

Q. You did not take into consideration—you did not pretend to testify about the value of the occupancy to the individual tenants?

A. I did not.

Mr. Jones: That is all.

(At this point the further hearing of said cause was adjourned to Friday, April 2, 1943, at ten o'clock a. m.)

489 Salt Lake City, Utah, Friday, April 2, 1943: 10:00

A. M.

(Pursuant to adjournment, the further hearing of said cause was resumed and the following proceedings were had.)

THOMAS E. GADDIS, the witness on the stand at the hour of adjournment, was thereupon recalled for further examination herein, and testified as follows:

Cross Examination.

(By Mr. Smith:)

Q. Mr. Gaddis, in making your examination of the various premises to which you have testified, did you make measurements?

A. I didn't take the measurements. I know what the measurements are from the government map.

Q. Do you know the number of square feet of space in the Gray-Cannon Lumber Company, especially rooms 100 and 102 in the rear of the Terminal Building?

A. Yes.

Q. Did you take into consideration the mezzanine floor in that floor space there?

A. Yes.

Q. How many square feet of floor space are there in that property?

A. In the mezzanine floor there are 2,624 square feet.

Q. And how many main floor square feet of space are there?

A. In their main floor, according to that map, there are 7,162 square feet.

Q. Did you examine the space occupied by the office?

A. Yes, sir.

Q. Do you know how many square feet in that?

A. 18 by 44 feet six inches.

Q. 801 square feet, isn't it?

A. 801, yes.

Q. Did you take into consideration the cost of heating those premises, Mr. Gaddis?

A. Yes.

Q. Do you know how many cubic feet of content there are in that location?

Mr. Clay: I object to that as immaterial, if your Honor please.

The Court: The objection may be sustained.

A. Yes.

The Court: No point in the cubic feet that I know of.

By Mr. Smith:

Q. What would be the cost of heating those premises?

Mr. Clay: I object to it as immaterial.

The Court: The objection will be sustained.

Q. The cost of heat is a material element in this rental value, isn't it, Mr. Gaddis?

A. It is.

Q. Can you determine what the rental value of
491 premises is without knowing what it costs to heat it?

A. I can give a guess.

Q. You can tell what the rental value is without knowing what it costs to heat it?

A. I would have to make an estimate of the heat where the heat is furnished by the landlord.

Q. You knew when you made your estimate of this place that the heat was furnished by the landlord, did you not?

A. Yes, sir.

Q. Did you go in the office portion of the Gray-Cannon Lumber Company premises while they were still there?

A. Yes, sir, I went to the door and looked inside the office. I didn't walk around in the office.

Q. Did you know there were two rooms in that office?

A. Yes.

Q. Did you go into the back room?

A. Just looked in.

Q. Did you look into the back room?

A. The office I refer to is the 18 by 44-6; that is the general office I saw and looked at.

Q. Do you know whether it is divided into two parts, a front room and a rear room, in that location?

A. My impression was it was an open room.

Q. The part you saw was lined with celotex, wasn't it?

A. It was either celotex or plywood; it was a nicely finished office.

Q. Very nice office, nice in appearance, wasn't it?

492 A. Yes.

Q. Did you know what plumbing fixtures were available for that office?

A. No, sir.

Q. You didn't know there was a rear portion of the office where Mr. Adams had his private room and desk then when you made your examination?

A. No, sir; I didn't see that.

Q. You don't know how large that front room you saw was, do you?

A. Yes, according to the plat it is eighteen by forty-four six.

Q. If it is divided into two parts, that is, the entire office space, the front room isn't that large, is it?

A. My impression is it was one long office. Might have been a partition there.

Q. If it is divided into two rooms, you didn't see the back room of the office?

A. No, I didn't.

Q. Are you able to express an opinion as to what the rental value of that office was?

The Court: Separate and apart?

Mr. Smith: Separate and apart, yes, your Honor.

Mr. Clay: I object to it as immaterial.

The Court: The objection will be sustained.

Mr. Smith: Exception.

493 By Mr. Smith:

Q. Mr. Gaddis, at the time you made your estimate of the rental value of the premises occupied by the Gray-Cannon Lumber Company you knew, did you not, of this new lease that had been entered into by these other parties who were ousted from the old Terminal Building?

Mr. Clay: Object to that as immaterial.

A. No, Mr. Smith.

The Court: He can answer that yes or no.

A. (continued:) I will have to elaborate on that question in this way. I went over there with Mr. Richards about the latter part of October or very early in November. That was the time I saw the Gray-Cannon Lumber Company office. I knew nothing about leases at the time.

Q. Did you take into consideration in your opinion as to the reasonable rental value of those premises here on the stand the rentals that had been contracted by the other tenants who had been ousted from that building, in their new locations?

Mr. Clay: I object to that as immaterial.

The Court: The objection will be sustained.

Mr. Smith: Exception.

Q. Do you base your opinion of reasonable rental value of premises upon other rents that were being charged or contracted at about the time in question?

Mr. Clay: I object to it unless it is shown in the same locality, in the same building, that had some reasonable comparison.

494 The Court: The witness can take care of that situation.

A. In placing rental on the Gray-Cannon location I considered rentals in the vicinity, yes, sir.

By Mr. Smith:

Q. Did you consider rentals in any other part of the town?

A. By comparison, yes.

Q. Rentals for industrial and business space is largely determined on a square-foot basis, isn't it?

A. Yes, sir.

Q. Have you an opinion as to the rental on a square-foot basis of the Gray-Cannon Lumber Company premises on November 11, 1942?

A. Yes, sir.

Q. What is the rental value per square foot of the premises of that company? Don't you know without computing it?

A. No, because it is different in location. You are around on Pierpont street; you are in an isolated district. I wouldn't consider that the same as West Temple or Main or State or Second South.

Q. But can you state now, from knowing the premises as you do, what the reasonable rental value per square foot of the space occupied by that company is?

A. About a cent and a half, I would say.

Q. Are you familiar with the property 333 to 359 Pierpont Avenue, recently leased by the government, the old Produce Row?

A. I know generally where it is, yes.

495 Q. Did you know the government had leased that?

A. I didn't know that.

Q. That was not taken into consideration in forming an opinion as to reasonable rental value?

A. No, sir.

Q. You stated in your direct examination, I think, that this Terminal Building had not been kept up and maintained.

Was there any evidence of lack of maintenance in the Gray-Cannon Lumber Company portion of this building for their purposes?

A. I can not say that there was.

Q. For the purpose of a wholesale lumber warehouse those premises were in a good state of repair, were they not?

A. Yes.

Q. The statement they were in a bad state of repair did not apply to that part of the building?

A. More particular reference to the upstairs; lack of paint on the outside of the whole building.

Q. Do you know of any vacant property in Salt Lake City having approximately nine thousand square feet of space suitable for warehouse uses that was vacant on November 11, 1942?

Mr. Clay: I object to that as immaterial and irrelevant.

The Court: The objection will be sustained.

Mr. Smith: Exception.

496 By Mr. Smith:

Q. Had the ramp been cut leading into the basement through the Gray-Cannon Lumber Company premises when you were over there?

A. It had. There were trucks in the basement at the time.

Q. You knew those trucks were for dead storage and would remain there rather indefinitely, didn't you?

A. Yes.

Q. So long as they were in, it wouldn't be necessary to use, except occasionally, any entrance through the Gray-Cannon Lumber Company premises?

A. I didn't go into that in detail.

Q. So your opinion as to the reduction in the rental value of the room 100 portion of the Gray-Cannon Lumber Company premises was based on the assumption that would be open at all times and those trucks would be going in and out at all times?

A. Definitely it is on the thought that Mr. Petty could go in and get a truck any time he wanted to.

Q. And that would be an active procedure at all times?

A. Yes—wasn't any time element when he could get his trucks, I think. It was a right-of-way through the building.

Q. Do you know if the ramp could be covered over as soon as the trucks were in there?

A. I don't know that.

Q. In your answer you assumed it would not be?

A. No, it was possible for it to be covered over; still, the right-of-way to take trucks in and out.

497. Q. Do you know of any warehouse space that could be rented for a cent and a half a foot in Salt Lake City on November 11, 1942?

Mr. Clay: I object to that as immaterial, if the court please.

The Court: He can answer that.

A. I do not.

By Mr. Smith:

Q. As a matter of fact, all of the warehouse space in Salt Lake City, practically, was occupied on November 11, 1942, on account of the war activity, wasn't it?

A. I believe that is true.

Q. Does a shortage of available space have a bearing upon its rental value?

A. Yes.

Q. Increases it if the supply is diminished—the rental value increases, doesn't it?

A. Naturally.

Mr. Smith: I think that is all.

Cross Examination.

(By Mr. Romney:)

Q. Mr. Gaddis, I think you stated in previous testimony that you felt a lease had some value?

A. Yes, sir.

Q. In many cases?

A. Yes, sir.

Q. With respect to the Petty lease, you heard the testimony with respect to its terms and its period?

A. I did.

Q. Would you then say that lease had some value?

A. Yes.

Q. And would you say it had some value over and above the amount of rent which was required to be paid under the terms of the lease?

A. It might, to Mr. Petty, from the landlord's standpoint—

Q. As a matter of fact, based on conditions of space available in Salt Lake City at that time for his purposes wouldn't you say it positively did have a value?

A. It undoubtedly did, yes, sir.

Q. Now, did Mr. Petty seek your assistance in an effort to find accommodations for storing these trucks and cars?

Mr. Clay: I object to it as immaterial, if your Honor please.

The Court: He may answer.

A. I don't know whether Mr. Petty did or not. But I know our office tried to get him space.

Q. And that was about this date, November 11, 1942, wasn't it?

A. During November some time, yes.

Q. Were you able to find satisfactory accommodations for him?

A. No, sir.

Q. You keep advised, don't you, by investigation and otherwise, of available space of this sort?

A. We try to, yes, sir.

Q. And you say you were pretty well informed on that subject at the time he sought your assistance?

A. Yes, we canvassed the town.

Q. You would say there was no space of a comparable nature available at that time, wouldn't you?

A. We didn't uncover it.

Q. As a matter of fact, you couldn't find any, could you?

A. No.

Q. Now, wouldn't that, then, in your opinion, result in his lease having a considerable value?

A. It would have value, yes.

Q. With respect, Mr. Gaddis, to the rental which you testified you thought his place to be worth, what did you base that estimate on—what facts?

A. Well, I based it on the fact that it was a basement and not a storage place, not an automobile storage place in any sense. There are many pillars, I wouldn't say how many, but masonry pillars all through that basement. I didn't measure them, but I think they are from six to eight feet square, come right up, center supports, take up a good deal of room. In looking at it I was amazed to see as many trucks and cars in there as I saw.

Q. You saw a lot of trucks and cars in there, didn't you?

A. Yes. I heard the testimony here about 27,000 square feet, but considering all the dead space—I am not sure that he could use the southeast corner of the basement—I don't think there is anything like 27,000 feet that can be used for storage.

Q. Will you refer to this map and indicate, please,
500 the portion of the space you think he could not use?

A. It was my impression. I would not say he could not use it—it was my impression he could not use so much of this space here (indicating). These are very large pillars. These are smaller pillars. Very small space taken off there (indicating).

Q. You didn't measure any of those pillars, did you?

A. No, sir, I did not.

Q. And you do not of your own knowledge know anything about the size of them?

A. I would say they are from five-by-five to eight-by-eight, between those figures.

Q. You mean those small ones?

A. The large ones.

Q. They were about five-by-five?

A. Yes.

Q. And the small ones, if this is drawn to scale, were nowhere near that size, were they?

A. No, they weren't.

Q. Do you have in mind about how large the smaller ones might be?

A. I would say at least three-by-three or four-by-four.

Q. Did you hear Mr. Petty's testimony that he had six cars and trucks in this southeast area?

A. Yes, sir.

Q. And six in the next stall to it?

501 A. Yes.

Q. That would make twelve in this comparatively small area in the southeast corner?

A. Yes, sir.

Q. Did you hear his testimony that he could accommodate—that the place would accommodate eighty trucks?

A. Yes, sir.

Q. And cars?

A. Yes, sir.

Q. You know nothing to the contrary, do you?

A. I do not.

Q. As a matter of fact, Mr. Petty testified that that area there was ten times the size of this court room. In making allowance for the pillars, isn't it your opinion there would have been sufficient room to store at least eighty cars and trucks?

A. It is possible.

Q. I hand you here, Mr. Gaddis, what has been marked Exhibit C, which it has been testified shows a portion of the basement with some of the pillars. Will you look at that and state whether from an examination of that you can estimate the size of those pillars shown?

A. I would say they are around three-by-three or four-by-four.

Q. Can you tell anything from the number of brick shown in each one of those pillars?

A. About three feet, sir.

Q. About three by three?

502 A. Yes.

Q. Now, referring to this map, Mr. Gaddis, again, this pillar shown by the picture, would you state whether that is one of the smaller or larger pillars in your opinion?

A. One of the smaller.

Q. Will you glance at this map, Mr. Gaddis, and referring to your statement that you felt this area here behind the ramp, that is, the area in the southwest corner, might not have been possible for utilization, will you look at this and the measurements shown, and state whether you feel it could not have been used?

A. I looked at it with Mr. Richards. My impression in looking at it was that it would be hard to make a turn with a truck here and here (indicating).

Q. What is the measurement here from the south wall to the ramp?

A. Marked there 86.6 feet.

Q. And the distance from the west wall to the east side of the area you thought could not be used is how much?

A. I don't see it marked there. It says 4-6 there; that is west of the stairway there.

Q. That would be what?

A. 44 feet.

Q. 44 by 86 feet?

A. Yes, sir.

Q. How many square feet would that be?

A. Just a question of mathematics.

503 The Court: We don't take time to practice mathematics.

Mr. Clay: I object to it as immaterial and irrelevant. And I think it is not proper cross-examination. I didn't go into that on our direct.

The Court: I know you didn't, but you went into the question—he testified as to what he thought the fair rental value was. Now he is trying to discredit that testimony.

By Mr. Romney:

Q. Mr. Gaddis, this area, then, measured 86 by 44 feet?

A. Yes, sir.

Q. The area which you felt might not be possible of utilization. Is that right?

A. Yes, sir.

Q. Now that area there was no different, substantially, than the rest of the area here that was being utilized, was it, with respect to accessibility?

A. Here is what I saw, this partition here (indicating). I saw the closeness here and here (indicating). I thought it would be rather hard to use that space, on account of the accessibility—

Q. Examining the map and distances, isn't it true that cars could have been brought through here (indicating) and distributed throughout this area (indicating).

A. From the map, I believe it is.

Q. At the time you were there, no cars were stored
504 in that part?

A. I didn't see any cars in that part.

Q. You are of the opinion it could have been utilized all right for that purpose?

A. It might have been utilized, yes.

Q. Did you observe heating pipes in the basement of these premises when you examined it?

A. I saw overhead pipes, yes.

Q. And the fact this area was underground and was a basement and that these heating pipes pass overhead, would you say the heating was adequate there for the purpose of storing cars?

A. Possibly.

Q. Would you state, Mr. Gaddis, if you know whether any special requirements are necessary with respect to property to be used for storing trucks that weigh 5,500 pounds and measure from twenty to twenty-two feet in length?

A. I don't get the meaning of your question.

Q. With respect to the floor supports and accessibility of the premises would you say it is more difficult to find premises in which to store trucks of that sort than for ordinary storage?

A. It would take a reinforced building to store them upstairs.

Q. Also isn't it true that many available warehouse spaces do not have entrances which will accommodate such trucks?

Mr. Clay: I object to that as immaterial.

The Court: In that form, yes. I think the objection will be sustained.

505 Mr. Romney: Exception.

Q. Mr. Gaddis, you have had occasion to assist

automobile dealers in trying to find storage space for trucks?

A. Yes, sir.

Q. Is it easier or more difficult to find space for that purpose than ordinary storage space?

A. It is.

Q. A special type of premises is necessary for that use, isn't it?

A. Yes—height of doors, a wide ramp.

Q. Your calculation or computation with respect to the rental value of these premises, was that made having in mind particularly the use to which Mr. Petty was making of it?

A. My computation was made on any use for a basement like that.

Q. It did not take into account any special advantage which Mr. Petty would put it to or use the property for, did it?

A. That was the only advantage I could think of in looking the property over. I thought it was very cleverly worked out.

Q. You thought it lent itself very well to his uses, didn't you?

A. Yes, sir.

Q. Did the fact that he had exclusive access to it and that the windows had been boarded up, the fact it was heated, was that taken into consideration by you?

A. I did not take the heat into consideration. I don't think there is heat there, except the little that will
506 come off these pipes that go through the basement. I didn't consider heat. I considered dead storage.

Q. Wouldn't that be of some advantage, in your opinion, having such heat as was available from those pipes overhead?

A. It is a tight, deep basement. For dead storage I don't think the heat would matter.

Q. Did you figure this on a square-foot basis, this rental of these premises?

A. Yes.

Q. What did you calculate it to be worth per square foot?

A. As dead storage I figured it was worth about a cent a foot.

Q. That is per month, isn't it?

A. Yes.

Q. A cent a month per square foot. Now, that is what you feel this place was really worth?

A. For the available space, yes, sir.

Q. How much available space did you compute to be there?

A. I think the available space in that basement is between seventeen and eighteen thousand square feet.

Q. Do you know that? Did you really do any figuring with respect to it? How many pillars or columns are there in it?

A. I didn't count them, sir.

Q. You don't know the size of the columns, do you?

A. Not exactly.

Q. So you have very little idea of the space which should be deducted for those columns, do you?

A. Yes, I think I have a pretty good idea. I think there is about between seventeen and eighteen thousand square feet.

Q. Did you hear Mr. Petty testify yesterday that he had figured his rental, the reasonable rental value of these premises on the basis of the number of cars and trucks which they would house?

A. Yes, I heard that.

Q. That he had figured they would house fifty trucks at \$3.75 per truck?

A. Yes.

Q. Per month?

A. Yes.

Q. And the passenger cars at \$2.75 per month?

A. Yes.

Q. That allowance had been made of eighteen dollars for one of those rooms in the basement which was to be used for storage accessories—of course you heard that, didn't you?

A. Yes.

Q. And fifteen dollars for the other.

In your opinion is that a fair basis of computing the rental value of those premises?

Mr. Clay: I object to that.

The Court: The objection will be sustained. It is always improper, and certainly bad practice, to undertake to have one witness pass upon the testimony of some other witness.

Mr. Romney: Exception.

508 By Mr. Romney:

Q. Mr. Gaddis, do you know the amount which is customarily charged for storing a truck in dead storage in Salt Lake City?

A. Yes.

Q. Will you state what that is?

Mr. Clay: Object to it as immaterial, if your Honor please.

The Court: The objection will be sustained.

Mr. Romney: Exception.

The Court: And I will say to you, that you may understand the ruling, that we are not trying a case here of profits.

Mr. Romney: Could I make a statement, your Honor?

The Court: No, not upon that question. That matter is settled, so far as this court is concerned, that you can not undertake to base your recovery upon loss of profits.

By Mr. Romney:

Q. Did you hear Mr. Kipp's testimony yesterday with respect to rental value?

A. I did.

Q. You heard him testify these premises he felt were reasonably worth \$338 per month?

A. Yes, sir.

Q. Would you say in your opinion they were not worth that amount?

A. I think that is very optimistic on that old basement over there.

509 Q. Do you know of any premises in Salt Lake City or vicinity of comparable nature which could be rented for \$303 per month?

Mr. Clay. Objected as to immaterial.

The Court: The objection will be sustained.

Mr. Romney: Exception.

Cross Examination.

(By Mr. Nelson:)

Q. Mr. Gaddis, you stated you based your square footage on the space in this building upon the government map. Do you have reference to Exhibit 1?

A. Yes, the map on the board.

Q. Will you kindly look at it.

Considering the space for the Brockbank Apparel Company, I take it you took into account just the space that is marked with red diagonal lines?

A. Yes, sir.

Q. On the basis of that space marked by the red diagonal lines you stated \$22.50 a month you consider a reasonable rate?

A. Yes, sir.

Q. And in considering that, Mr. Gaddis, you base that on the same theory you did the other space in the building, that it was for any purpose, and not with reference particularly for the purpose of this—

A. I considered the rentability of the space for any tenant. I don't know what it is worth to Mr. Brockbank.

Q. For any purpose?

A. That is right.

Q. The majority of the upstairs space was in a bad state of repair, wasn't it?

A. It was.

Q. Having reference particularly to the unoccupied portions?

A. That is right.

Q. Did you actually go in the space occupied by Brockbank?

A. I looked in the room. They were operating some machines. I didn't go into the room, just looked in.

Q. You merely stood at the front door on the east and looked in the room?

A. That is right.

Q. Did you go any farther than the front door?

A. Inside the door. I didn't walk down through the building.

Q. Didn't go through the partition here (indicating)?

A. No.

Q. Just stood inside the door and looked through?

A. Yes.

Q. You didn't actually enter this big room?

A. Yes, I saw the big room.

Q. You saw it through the partition doors?

A. Yes.

Q. Through the two partition doors?

A. Yes.

Q. From all you could see, Mr. Gaddis—you only went in once, didn't you?

A. That's right.

511 Q. From all you could see, the premises were equipped—were operated satisfactorily for the use of Mr. Brockbank, were they not?

A. So far as I know.

Q. And they were not in a bad state of repair, the spaces he occupied, were they?

A. I wouldn't say they were.

Q. Not nearly as bad as the remainder of the upstairs, which was unoccupied?

A. That's right.

Q. Do you know whether the plaster was on the walls in that particular occupied space?

A. Didn't see any off.

Q. Appeared to be all right?

A. Yes.

Q. Light fixtures were all right?

A. Yes.

Q. Everything was in good state of repair?

A. Fair state of repair. Looked all right.

Q. As far as his space was concerned?

A. Yes.

Q. So when you are referring to the upstairs being in a bad state of repair, you are referring primarily to the unoccupied portion of the building, aren't you?

A. Yes, sir.

Q. What is the rate per square foot you have computed to Brockbank's space?

512 Mr. Clay: I object to that as immaterial.

The Court: The objection will be sustained. He has not said he computed it on that.

By Mr. Nelson:

Q. Did you compute the rental rate of the Brockbank space on a square footage basis?

A. I looked the property over. From my standpoint—

Q. Will you answer the question? I think you can do that.

A. I didn't think about that from a square-foot basis. I thought of it as actual flat rent for the space in a vacant building.

Q. So as to the Brockbank space, you didn't compute it on a square footage basis?

A. That's right.

Q. All you did was stand at the front door, inside the front door, take one look through, and say \$22.50 a month is a reasonable rate for that space for any purpose?

A. I thought it was remarkable to keep the tenants in there for that much money.

Mr. Nelson: That is all.

Redirect Examination.

(By Mr. Clay:)

Q. Mr. Gaddis, in appraising all of this property, as a basis for the appraisement did you consider the reasonable rental value and that only?

A. Yes, sir.

Q. And regardless of whether it was used for storage space or whether used for lumber business or for printing business or any other business?

A. Considered it from a competitive rental standpoint.

Mr. Clay: I think that is all.

WERNER KIEPE was thereupon called as a witness by and on behalf of the United States, and having been first duly sworn herein, testified as follows:

Direct Examination.

(By Mr. Clay:)

Q. Will you state your name, please?

A. Werner Kiepe.

Q. Mr. Kiepe, you are connected with the United States Government at this time?

A. Yes, sir.

Q. And in what capacity, please?

A. I am engaged as real estate appraiser for the real estate section of the Pacific Division of the U. S. Engineers.

Q. In Salt Lake City?

A. Yes, sir.

Q. And have been so employed for how long?

A. I became employed by the United States Engineers on July 1, 1942.

Q. And what business were you engaged in prior to that time?

A. Prior to that time for the preceding five and a half years—

Q. I am going to withdraw that question, Mr. Kiepe, and ask you if you will state briefly what experience you have had as an appraiser, what connection you have had with the real estate board or any other board or any of these other agencies.

A. I have been actively connected with the real estate business since December 1, 1926. At that time I became associated with the Real Estate Board as their executive secretary. All of my work in connection with that organization—I had to supervise and be associated with the appraisal committee of the Salt Lake Real Estate Board and participated in all the appraisals which were conducted by that organization.

During that time the Salt Lake Board re-appraised all the real estate, all the land in Salt Lake City for the county assessor and State Tax Commission. I had charge of that work.

During that time also I got a short leave of absence and went to the University of Chicago and studied appraisal technique. Following that time I made application to the American Institute of Real Estate Appraisers for member-

ship in that organization and was accepted and have been a member of that organization since 1937.

That organization requires a man to have at least eight years of practical experience as a real estate appraiser and that he pass a very rigid examination to show his qualifications and to fill in every way the requirements established by his professional organizations.

Q. Does that organization exact any requirements relating to integrity or common every-day honesty?

A. It is one of the primary requisites. They require you to present many credentials.

Q. Are there other members of that society in Salt Lake except yourself?

A. There are two in Utah—myself and Mr. Wright.

In 1937 I resigned that position and became affiliated with the Union Investment Company, which later became the Union Trust Company. I was engaged by that company as their sales manager in charge of their real estate department.

During that time I served as president of the Salt Lake Real Estate Board; served for two years as chairman of the Salt Lake Real Estate Board appraisal committee, and have been continuously a member of that committee, serving it many times. During that time I became quite familiar with the property which is in question, because it was our job to try to sell it.

During our effort to sell it I personally negotiated the sale of the part of this property which lies to the west, which has been referred to in this case as the property of the Western Newspaper Union. They purchased a part of the Terminal property in 1941.

In 1941 I also sold the property that is located at the corner of Second South and West Temple which is now occupied by the Standard Oil Company property, which is somewhat similar to the property in question.

I have appraised many properties in Salt Lake City, served many organizations as an appraiser.

Q. During the time you were connected with the Union Trust Company was the Union Trust Company agent of Metropolitan Life Insurance Company?

A. They were.

Q. The owner of this property?

A. They were.

Q. The Metropolitan Life Insurance Company was the owner of this property for about how long and covering what period of time?

A. When the Union Investment Company came into the picture and absorbed the Halloran Savings & Trust Company, that was one of the properties we acquired at that time. Just how long the Halloran Company had managed and operated the property prior to that time I would not be able to answer accurately.

Q. Mr. Kiepe, your office is now in the Terminal Building?

A. Yes, sir.

Q. You have been an occupant of that building since it was taken over by the government?

A. Shortly after. We were the first agency to move in.

Q. Can you describe those premises as of November 11, 1942, or on or about that date—I mean the entire premises, the entire building from the basement up to the second story?

517 A. The property is located at the northeast corner of West Temple and Pierpont Street in Salt Lake City—

Q. I mean the condition it was in.

A. The property is improved with a two-story brick and stone building with frame construction inside. It is an old building, approximately—I think it was built prior to 1900—possibly fifty years old.

At the time we inspected it for use by the government it was occupied on the first floor by the people who have been defendants in this case with the exception of one store which was vacant located just south of the property—two doors south of the Grimsdell property.

Q. May I direct your attention— This is the Grocer Printing Company (indicating); this is the Pneumatic Tool Company. Just next door south, was that the vacant store?

A. Yes, sir, that is the vacant store.

Q. The vacant store was between the Pneumatic Tool Company and what other tenant?

A. The entrance to the building, the upstairs entrance.

Q. How long had that store been vacant?

A. The last regular tenant of that property was the Gardner Printing Company. They went out of business the latter part of 1939. During that time there was a short occupancy of that property by a former tenant of the McIntosh Block, who moved in there for a period I would estimate roughly of six months.

Q. How long had it been vacant?

518 A. It was vacant from perhaps the beginning of 1940 to the date of November 11th except for a six months tenancy.

Q. Proceed to describe the building, please.

A. The stores on the first floor, by and large, were in a fair state of repair. These tenants did their own cleaning and made their own repairs inside of their property, and they were just as they elected to have them.

The basement at that time, of course, was occupied by the Petty Motor, but previous to that time we might say there was no use made of the basement. Mr. Grimsdell used a small part of it for excess and perhaps for unused metal and so forth.

Q. How long had the basement been unoccupied?

A. It had never been occupied, to my knowledge.

Q. During the entire five years you have known it?

A. That is true.

The upstairs had one tenant, the Brockbank Apparel Company, which occupied a complete row of offices on one of the wings—I would not say that entirely, because we also had as tenants in there the W P A, who did art projects in there for public institutions and so forth. I think the Price murals were first sketched out in that building, and other public murals.

Those premises were in a poor state of repair. In fact, they were entirely unpresentable from a sales point of view. I shuddered every time I had to show anybody or thought of showing anybody into that part of the building.

519 However, the premises of the Brockbank Apparel Company were reasonably well maintained. Again, they were being maintained by the tenant, and he did his cleaning and so forth, and I feel they were satisfactory to his needs.

Q. What effect, if any, in your opinion, would the surroundings of Mr. Brockbank's premises have upon its rental value?

The Court: By "surroundings" what do you mean?

Mr. Clay: The condition of the upstairs north of the Brockbank—

The Court: You mean in the building?

Mr. Clay: In the building itself.

A. The unoccupied vacant space in the building was entirely a detriment to the other tenants within the building; any one on the second floor; and I would think it would also be distracting to those tenants below.

By Mr. Clay:

Q. Depreciate the rental value?

A. It would.

Q. Have you finished with the upstairs?

A. Yes.

Q. You might direct your attention to the downstairs, and particularly let me ask you this, directing your attention to this map which shows the basement, an outline of it, are all the posts in the basement shown on this map?

A. No, sir.

Q. Let me direct your attention to the southwest portion of the map and ask you to describe the condition of the basement in that particular portion with reference to the number of posts and the size of the posts.

A. The area referred to is the portion just under the Gray-Cannon Lumber Company. It has been testified to that there was a cement floor in this area. That cement floor was laid over a wooden floor, and in order to support the additional weight and to take care of the floor weights which would be put in there, this entire area is filled in with wooden supports or posts which would be approximately eight-by-eight.

It has been testified the height of this floor is the height of this ceiling. The ceiling in this part is only eight feet high, and this entire area is secondary support or wooden braces or wooden posts all the way through the area.

Q. How close together, approximately?

A. Those posts, of course, have been set in at different places, but the posts are so close that I concluded it would be impossible to place a car in there without completely disassembling it. I don't think you could drive a car in any part of that area and leave it altogether.

Q. What is the size of the brick posts in that section?

A. The brick posts throughout the basement are about three-by-three feet.

Q. Are they the same size at the base as at the top?

A. Most of the brick posts are, but these large columns, these large piers which are throughout and the supporting walls—this wall through here (indicating) this wall through here (indicating) and this wall here which are heavy stone walls supporting the building are eight feet wide at the bottom. These piers (indicating) are about five-by-five at the top. The brick walls are approximately three to four feet thick at the top, I mean by that the point where they support the floor. They spread out at the bottom.

This brick wall (indicating) through which this opening was cut to bring to bring these cars, this wall is eight feet wide.

Q. Eight feet thick?

A. Yes. It is made of red sandstone. It is very heavy.

Q. About how long is it?

A. This partition runs all the way through the building this way (indicating), as does this one (indicating), with the exception of this gap in here.

Then there is a heavy stone wall through here (indicating).

Q. As a result of that condition do you have a judgment, Mr. Kiepe, as to whether or not it would be possible to store eighty cars in there, that is to say, as I remember it, sixty trucks—

Mr. Clay: Have you got those figures, Mr. Romney,—how many trucks and how many cars?

The Court: He said fifty.

Mr. Romney: Fifty trucks, thirty passenger cars.

Q. (continued)—fifty trucks, thirty passenger cars?

522 Mr. Romney: We object to this as calling for a conclusion, and the witness is not qualified to testify to that, or shown to be.

The Court: I think from the way he has described the property he would be qualified, if he knows how big a truck is,—I believe that is all that is left out.

By Mr. Clay:

Q. Do you know the size of a Ford truck, one-ton truck?

A. They vary, of course, varying sizes to the trucks both as to width and length.

I understand that the specifications for the smaller Ford trucks is 82.06 inches as the width from outside of wheel to outside. Of course they vary in length depending upon the job which you have. But knowing the width requirement and measuring up the space in many spots where there might be a question as to how many widths or how many lengths of cars you might put, and assuming these cars would have to be set upon the ground, since they were to be raised from the floor, which would preclude their being mounted one upon the other, I assume it might be done, though I would hesitate to guess on that,—but assuming they would set on the ground, one by one, it would in my opinion stretch the total capacity to put in fifty trucks, of what we consider regular trucks, in that basement. Because I have measured many of the spaces. I know while there is a great deal of space in there, the location of posts which are twelve by twelve feet apart would preclude cars being placed side by side in a twelve-foot space. You could-

523 n't turn a car in one way or the other if you had to set them up on blocks.

Q. Mr. Kiepe, I will ask you, based upon your experience in general and your familiarity with that building if you have a judgment as to the reasonable value of the premises occupied by the Grocer Printing Company as of November 11, 1942?

A. I have.

Mr. Nelson: This doesn't concern my client, but I believe it is a proper time to raise the question as to whether

or not the United States would be permitted more than one expert witness. We make the objection on that ground.

The Court: You folks have used more than one,—all of you have used more than two witnesses. But I will limit him to this witness and Mr. Gaddis.

Your question is objectionable in the form you put it. You wanted to know the reasonable value of the property occupied by the Grocer Printing. We are not involved in the value of that property. We are involved as to its rental.

Mr. Clay: Didn't I say rental?

The Court: No.

By Mr. Clay:

Q. I will ask you, Mr. Kiepe, based upon your familiarity with these premises and your experience as an appraiser and real estate man, do you have a judgment as to the reasonable rental value of the premises occupied by the Grocer Printing Company in the Terminal Building as of November 11, 1942?

A. I have.

524 Q. And what, in your opinion, was that value?

A. In my opinion the rent paid by Mr. Grimsdell, eighty dollars a month, was the reasonable rental value at that time.

Q. In your opinion was it worth any more than that?

A. No, sir.

Q. I will ask you the same question with reference to the Independent Pneumatic Tool Company.

A. Yes, I have a judgment; and in my opinion the fair rental value of that property as of that date was forty-five dollars a month.

Q. I will ask you the same question with reference to the Chicago Flexible Shaft Company?

A. In my opinion the fair rental value of that property was one hundred dollars a month,—the rent which was being paid.

Q. And the Galigher Company?

A. In my opinion the fair rental value of that property as of that date is one hundred fifty dollars a month.

Q. The Brockbank?

A. In my opinion the Brockbank occupancy as of that date was \$22.50 a month.

Q. In your opinion do you think the premises of the Pneumatic Tool Company were worth any more than you have testified, that the reasonable value of that was forty-five dollars a month as of November 11, 1942?

A. No, I think the fair rental value was forty-five dollars a month.

525 Q. And that would be your answer also as to the Galigher and the Flexible Shaft and Brockbank?

A. Yes, sir.

Q. Now with reference to the basement, Mr. Kiepe. What in your opinion was the reasonable rental value of those premises as of November 11, 1942?

A. Two hundred dollars a month.

Q. Their lease provided for two hundred and twenty dollars the first four months; one hundred and ninety dollars for the next four months; and one hundred and fifty dollars for the next four months.

By that do you mean that it would be two hundred dollars a month for the first four months?

Mr. Romney: We object to that as leading, and argumentative.

The Court: If you are repeating what he said, we all heard it, so leave that out, and go direct to the question.

By Mr. Clay:

Q. Would that be on an average for the year, Mr. Kiepe, for the Petty Motor Company?

A. I think the lease which Mr. Petty had was a very good lease, and I feel that was a fair rental value.

Q. How much?

A. The average which he would pay over that period of time.

Q. Under this lease?

A. Yes. I would think the maximum he should pay was two hundred dollars a month at any time.

526 Q. And if it averages one hundred and eighty-six dollars a month, or one hundred and sixty-six, you would say that is the fair rental value for the average time?

A. For the year, yes, sir.

Q. Mr. Kiepe, Mr. Grimsdell told us on the stand that one of the advantages to the location in the Terminal Building was that he only had one competitor in that locality—

Mr. Jones: Just a moment. I don't think he testified to that, at all, and that is not the result of his testimony.

Mr. Clay: He testified he only had one competitor.

Mr. Jones: He testified in the locality where he was, the print shop was across the street and they were still in the district and he is out of it.

The Court: I think if you will object to it, referring to Mr. Grimsdell's testimony at all, I would sustain the objection.

Mr. Jones: I will do that.

By Mr. Clay:

Q. I will ask you this question. How many print shops are there in the locality of Second South and South West Temple?

The Court: You mean were there?

By Mr. Clay:

Q. —were there on November 11, 1922?

Mr. Jones: And tell us where they are.

The Court: And who they are.

527 By Mr. Clay:

Q. May I first ask you concerning the location of the Salt Lake Times Printing Company?

A. They are located in the property at about 67 West Third South.

Q. How far from the Terminal Building?

A. It is approximately a block.

Q. And the Western Printing Company?

A. The Western Printing Company is in the Metropolitan property at about 265 South West Temple.

Q. And the Arrow Press?

A. They are located at 60 West Second South.

Q. How far from the Terminal Building?

A. Approximately a block.

Q. And the Ford Jorgenson Press?

A. They are in the property just north of the one Mr. Grimsdell now occupies, about 117 South West Temple.

Q. They are on the same side of the street where Mr. Grimsdell now is?

A. Yes, sir.

Q. And in the same block?

A. Yes, sir.

Q. That would be a block from the old location?

A. Yes, sir.

Q. And the Paragon Press?

A. They are about 115 West Second South.

Q. About how far from the Terminal Building?

528 A. Quarter of a block.

Mr. Clay: That is all.

Cross Examination.

(By Mr. Jones:)

Q. Let's come to these printing shops. As I wrote them, hurriedly, on November 11th there were only two on West Temple between Second and Third South,—Grimsdell and the Western?

A. That's all I know of.

Q. Now there is only one, that is the Western?

A. True.

Q. So in the locality of West Temple where Mr. Grimsdell was, people coming there on that street to find a print shop would find only the Western left?

A. In that block, yes, sir.

Q. I am not sure whether I got this right, Mr. Kiepe,—you have been exclusively employed as real estate appraiser for the Pacific Division of the United States Engineers since what date?

A. July 1, 1942.

Q. And prior to that were you with the Union Trust Company?

A. Yes, sir.

Q. For how long?

A. Five and a half years.

Q. The Gardner Printing Company, that was in the vacant space next to Mr. Grimsdell?

529 A. That was a mistake. There was one over—I think the Independent Pneumatic Tool was next to Mr. Grimsdell.

Q. I think you so testified. I think your testimony was correct, that they were in the vacant space south of the Independent Pneumatic Tool Company.

Do you or do you not know the Gardners, the boys who ran that, died?

A. I don't know the cause of their discontinuance of business.

Q. You don't know that?

A. No.

Q. You didn't know them personally?

A. No, I didn't.

Q. Your familiarity generally with conditions has extended over a great many years here in Salt Lake City?

A. Yes. It is my home.

Q. Did you or did you not know the Gardners occupied that property as a printing shop and were in there even before Mr. Grimsdell was?

A. I am sure they were there a long time. I worked for the Romney Rug Company. We were on the second floor many years before that, and I recall they were there.

Q. So they occupied that property as a printing establishment. Assuming Mr. Grimsdell was there twenty-six years they were there, then, longer than that?

A. They may have been.

Q. So in your judgment the Terminal Building was very suitable for printing establishments?

A. Yes, I think it was suited to that.

530 Q. Coming again to Mr. Grimsdell's property, you were connected with the Union Trust Company at the time new floors were put in the Grocer Printing Company, were you not? Do you know or do you not that new floors were put into the Grocer Printing Company by the landlord just a few years ago?

A. No, I do not.

Q. And the same with Mr. Wiggs, the Chicago Flexible Shaft Company?

A. No, I am not.

Q. So to that extent you modify your testimony that the defendants made all the repairs on their premises?

A. Yes. They maintained them, cleaned them and so forth.

Q. Are you familiar with the fact that the landlord put in steel ceilings in the Galigher and the Wiggs property?

A. At what time?

Q. Three or four years ago.

A. No, I didn't know that.

Q. Metal ceiling—I don't know whether it was steel or not.

A. The metal ceilings in the Galigher and in the other were ceilings which I would judge must have been in the building at least twenty-five years.

Q. That is your judgment?

A. Yes, because those ceilings date back at least twenty-five years.

Q. If metal ceilings were put in there recently, you didn't know anything about it?

A. No, sir.

Q. Now, then, Mr. Kiepe, you went over and inspected all these premises and you say that the premises of the four tenants were just in moderate condition, is that right?

A. Yes.

(Exhibits 14, 15, 16 and 17 were thereupon marked by the reporter, for identification.)

Q. I show you what has been marked Exhibits 14, 15, 16 and 17, and ask you to look at those, Mr. Kiepe, and say if you can tell me what they are.

A. Of course I can identify No. 15; it is the front of the Independent Pneumatic Tool Company.

Q. Is that about the way it looked on November 11, 1942?

A. I would say so.

Q. And do you know when these signs were put on there, "Independent Pneumatic Tool Company, Electric Tools, Pneumatic Tools, Rock Drills, Paving Breakers"?

A. I recall in connection with that property—I have always called that the Cochise store. I remember there was a change made, though I would be unable to say as to the exact date.

Q. Would you know that the signs on there were put on in August of 1942?

A. I don't recall that.

Q. You don't know that?

A. No, I don't recall that.

Q. Do you recognize any of the other pictures?

A. No, I don't.

Q. Yet you say you were familiar with that property?

A. Yes, I have inspected it a number of times.

532 Q. You don't recognize this as the quarters of the Independent Pneumatic Tool Company?

A. No, I don't.

Q. If they are, you don't know anything about them?

A. About these pictures, that is true.

Q. And about their quarters, if these are the pictures of their quarters?

A. I was in their property.

Q. You don't recognize the pictures of it? If these are the pictures of that Independent Pneumatic Tool Company, you don't know anything about these quarters?

A. No, I wouldn't recognize them positively.

Q. When you say they were in fair condition, were you speaking of premises that looked like these?

A. I have in mind—

Q. Will you answer my question?

A. I would have to qualify my answer.

Q. Go ahead.

A. I would say that the thing which was being done on November 11th, namely, the painting of the exterior of the building, was one of those things which I would consider definitely a need of the property and one which reflected against all of the stores that were there.

Q. I didn't ask you about that. I asked you about the Independent Pneumatic Tool Company.

A. They are part of the property; I would consider them as part of it.

Q. You consider these pictures are just fair—

533 A. I would say they were good pictures.

Q. I mean, they just show the premises in just fair condition?

A. I would say they show the property in good operating condition.

Q. So that would you modify your testimony on direct examination now? At least I got the impression from it

that you were deprecating the premises of these four defendants—that that is not now your testimony, and that these premises are in good condition?

A. I would like to have it show I didn't intend to depreciate the premises you represent. I mean to say the properties were in reasonable and in moderate condition as to their occupancy as of that date. They were not modern in the sense we would compare them with modern buildings of today.

Q. For the purposes for which they were used, Mr. Kiepe, they were adequate, were they?

A. I assume they were adequate. I think they were adequate for the tenants, yes.

Q. And suitable?

Mr. Clay: I object to that as immaterial.

The Court: He can answer if he knows.

A. I think they were suitable for those people, yes.

By Mr. Jones:

Q. As to the Galighers, you say the metal ceiling was twenty-five years old?

A. Maybe I was a little optimistic. I think pressed
534 ceilings like that were put in thirty-five years ago.

Q. So if it was put in three years ago—

A. Must be old-fashioned.

Q. You were the property manager of the Union Trust Company?

A. No, I didn't say that. I said sales manager.

Q. You were the sales manager, and if the Union Trust Company representing the landlord had any participation in putting those new metal ceilings in three years ago, you don't know anything about it?

A. That is true.

Q. So your testimony must be discounted to that extent?

Mr. Clay: I object to that as asking the witness to pass on his own credibility.

Mr. Jones: I am asking him what he took into consideration.

The Court: You are assuming it was put in three years ago.

Mr. Jones: I am going to show that.

The Court: I understand that. He says all he knows about it is twenty-five or thirty-five years.

By Mr. Jones:

Q. Did you know the Galigher place was entirely ~~kal-~~somined two or three, or three or four years ago at the time you were with the Union Trust Company?

A. The Galigher place was clean, yes.

Q. In fact, their offices were very good looking offices, were they not, Mr. Kiepe?

535 A. Not modern in the sense—you can not compare them with the quarters they occupy now. They are much nicer quarters.

Q. I didn't ask you that.

A. You are trying to get me to admit they were fine. They were not fine. They were just moderate.

Q. I say, the Galigher offices were good-appearing offices, were they not?

A. They were moderate appearing offices.

Q. Modern?

A. Moderate.

Q. You say they were not modern? You have already testified the building was fifty years old?

A. True.

Q. What about their light fixtures?

A. They put in new fixtures.

Q. They were modern as to that, weren't they?

A. Yes.

Q. They were modern as to their equipment, were they not?

A. I didn't appraise the equipment. They had some desk lamps—it was suitable for the location.

Q. You don't know whether the whole thing was painted, do you, three or four years ago?—I am talking about the Galigher's.

A. I have no knowledge of the actual work that was done, or when it was done.

Q. That they had a new toilet and new linoleum there?

A. Yes, I saw that.

Q. That was new?

A. That was relatively new.

Q. That was modern, wasn't it?

A. Yes.

Q. New light, overhead lighting, that was modern?

A. Yes.

Q. And thermostatic temperature control for their heating system, did you know they had that?

A. I knew they were being heated adequately.

Q. Did you know their heat was thermostatically controlled?

A. No, I didn't know that.

Q. That that was all modern and up-to-date, did you know that?

A. No, I didn't know anything about the thermostatic control.

Q. Are those essential elements of premises for business property, for offices?

A. I think they are part of those things that should be considered, yes.

Q. Are they important?

A. I think they are important, yes.

Q. On many important details you were unfamiliar with it as far as the Galighers are concerned?

A. I don't think they materially would change my judgment.

Q. I don't care about that. We will let the jury do that. I am just saying, as to material elements you were totally unfamiliar with them as far as the Galighers are concerned. That is true, isn't it?

A. No, sir.

537 Q. Go over it again—

Mr. Clay: I object to it as immaterial.

Mr. Jones:

Q. Let's recapitulate. You don't know anything about the new metal ceiling?

A. No, there was no new metal ceiling.

Q. You don't know anything about it if there was?

A. No.

Q. Is that a good thing in property?

A. I saw the ceiling.

Q. Is that a good thing?

A. Yes, important.

Q. You didn't know anything about thermostatic temperature controls?

A. That is true.

Q. You didn't know anything about the new painting and the new kalsomining?

A. That is immaterial.

Q. Whether the premises are painted up and kalsomined is immaterial?

A. No, that wasn't true. I am willing to concede the property was tenantable, that it was clean, I have admitted that. If it was painted yesterday or a week ago as to condition wouldn't alter the value of this property.

Q. I am not talking about value. I am talking about appearances. You have at least given me the impression this was just so-so.

A. A place that was painted three years ago is just so-so.

Q. That is what I want to get at here.

A. Because you have to paint every three years to keep a place looking nice.

Q. Through the smoke in this city any place runs down if it is not kept painted oftener than three years, doesn't it?

A. Yes, they clean oftener.

Q. Does that depreciate the value of it?

A. That you have to clean it?

Q. Yes.

A. Yes.

Q. Have to do that all over town?

A. Yes.

Q. So everything in town is depreciated?

A. That's right.

Q. You said the unoccupied space upstairs would be a detriment to all the tenants. What did you mean by that?

A. Let's assume you were the only tenant in the building. Obviously, that would be a detriment.

Q. Lets not assume anything of the kind.

A. Any vacant space in any area, any unused space obviously is that which is undesirable and untenable.

Q. How did it hurt Galighers that there was some vacant space upstairs?

A. It would have helped them if it had been occupied.

Q. Why?

A. Because it brought more people into contact.
539 Might have been occupied by people with whom they would do business. It brought a greater number of people into that area, which, after all, is a factor which makes value.

Q. Then you consider it a great factor in the value of a location that the business is located at a point where customers know them and where they come, don't you?

A. Yes, I think it helps.

Q. That is what you meant.

You don't think it helped Galigher—or hurt them, with their customers, that upstairs there was a vacant room?

A. Is that a question?

Q. Yes.

A. I thought you were making a conclusion.

I think I have said what I thought in that matter. I consider it a detriment to have a lot of vacant space, surrounding area.

Q. Do you think the people they correspond with, that they did engineering service for, in South Africa or in Alaska or in South America or North Carolina, cared one way or another whether the property upstairs was vacant or not?

A. No. I don't think they would be concerned. They weren't renting the property.

Q. Do you think their customers here—take Mr. Baird of the Pneumatic Tool Company, do you think he would say to himself, I don't like to trade with Galigher, because the property up above is vacant—you don't think that, do you?

A. He might. He would know pretty well what
540 the situation was.

Q. That is what you meant, then, one of the things you meant when you say it hurt Galigher because Mr. Baird might object that your company, the Union Trust Company, had not rented the upstairs?

A. I think it hurt the rental value of this property to have a great portion of it untenable.

Mr. Jones: I don't think I want to pursue that any further. That is all.

Mr. Smith: No cross-examination.

Cross Examination.

(By Mr. Romney:)

Q. Mr. Kiepe, the condition of this building would in no way detract from its value for use for dead storage of trucks, would it?

A. No, I would think not. That is, the conditions about which I have been asked in the cross-examination.

Q. You say you think it would not accommodate—could not get any more than fifty trucks in the basement?

A. That is right.

Q. Did you go down and inspect it while the trucks were in there?

A. There were only a few trucks left—

Q. They were in the process of removing them when you first saw it?

A. Yes, sir.

541 Q. If, in fact, there were sixty trucks, as has been stated, then you would be in error in your calculations?

A. To the sum of ten trucks.

Q. That would be one-sixth, you would be off one-sixth in your estimate, wouldn't you?

A. Yes, sir.

Q. It is reasonable to suppose you might be off at least a similar percentage in the other figures with respect to the placing of the pillars, and so forth?

A. No, sir, I don't think so.

Q. Tell me just the distance between these pillars, if you will, in that basement.

A. I will be glad to do the best I can to remember.

There were a lot of pillars—

Q. Tell me where they were, and how many.

A. Which area?

Q. Right down in the area in the center here, east of the ramp,—how many pillars were in this area?

A. I think this area here (indicating) had been fairly well represented by these posts or pillars or piers, they should be called, in that particular area.

Q. In what area on the map are they not shown properly?

A. In this area here (indicating).

Q. Any other part that they are not shown accurately?

A. Yes. There are some piers in here (indicating) which are not shown.

Q. Who drew this map?

542 A. Our office.

Q. Produced by your office?

A. Yes, sir.

Q. It was supposed to reflect accurately the condition of that basement, the measurements and placement of all things in there, wasn't it?

A. It was intended to represent the things in there.

Q. It was intended as an exhibit in this case?

A. I presume so.

Q. Will you tell me how many piers there were on this side immediately west of the red portion that you have marked on the map as "Raised floor vacant" and part of it "Grocer Printing Company support"?

A. Don't say "you"; that might be misunderstood. I haven't had anything to do with the preparation of it.

Q. How many piers not shown on there that exist?

A. In this area (indicating) Mr. Grimsdell had put in concrete bases which stand approximately two and a half feet above the floor which set right in here (indicating) and they are the supports which were under his heavy presses in that space under the Grocer Printing Company.

Q. Was that in the part which is described as room occupied by them?

A. No, sir, the stairs into the room. This is "Raised floor". The stairs into the room are marked here (indicating).

Q. How many of those uprights are there in that area?

A. They cover this area through here (indicating).

543 Q. How much. What measurement?

A. They cover a space approximately—I would say this area here is a space approximately ten feet through here (indicating) and twenty feet long.

Q. 200 square feet?

A. Yes.

Q. Do you know the total area of that building?

A. Yes.

Q. What is it?

A. The total area has been spoken of here, about 27,000 square feet on the outside, which is not floor space at all.

Q. What is the floor space?

A. That would be inside measurements.

Q. What does that amount to?

A. I felt that wasn't necessary. I think you can go into space where you are obviously storing cars and make estimates.

Q. In any event, only about two hundred square feet would be deducted for the purpose of making allowance for this occupied area for the posts?

A. I would like to make a correction which will be in your favor. This is a raised floor here (indicating); this is a cement floor (indicating) in which cars could be stored. This is the part that Grimsdell had, this raised floor here (indicating). This is another area you couldn't get into because of wall.

Q. Could be used for parts?

A. Yes.

544 Q. Accessories?

A. Yes.

Q. You heard Mr. Petty's testimony that he was using it, didn't you?

A. I don't think the Ford Motor Company has that much space for parts in the entire state of Utah.

Q. It is adequate, isn't it, for parts?

A. Yes. If this was the only entrance in there, and had to be all filled with cars, this would be a poor place for parts.

Q. It could be used for that, couldn't it?

A. Yes, you could store anything in there that was small enough to carry it in.

Q. Do you know how much square footage is required per truck?

A. Yes. If the outside measurements are eighty-two inches, which is approximately seven feet.

Q. Are they that?

A. Factory specifications say 82.06 is the narrowest width you have of a car. If you allow one inch on each side you would have approximately eighty-four inches, or seven feet which would be required by a car.

Then your length would average from eighteen feet up.

Q. That would be how much required per truck, approximately?

A. 20 times 7, 140 square feet.

Q. Can you estimate the area of this court room?

A. I wouldn't attempt to. I can measure it.

Q. There were wide openings here between all of these areas in the basement, weren't there?

A. Let me finish another question. You asked
545 how far these are apart. These posts here have about twelve feet between them. That means you can not put two cars in between them.

Q. You can put them all down this way, can't you (indicating)?

A. Yes.

Q. You can put them all down this way (indicating)?

A. You can only put one row down here (indicating).

Q. Do you know how they store dead-weight cars?

A. Yes, I have seen various ways.

Q. Do you know they need no clearance between them, and allow for none, ordinarily, put side by side?

A. That is right. That is why I said eighty-four inches—an inch between them.

Q. There is access to any of these areas in this basement from the ramp, isn't there?

A. No, this has not been made accessible yet, only a small opening into this area. It wouldn't be big enough to push a wheelbarrow through.

Q. You mean between these two posts there is only room for that?

A. Yes.

Q. What will you state is the measurement of that pillar?

A. I testified this entire area was supported with secondary supports to support the concrete floor, poured over the board floor in this area here (indicating.)

Q. How far did that stand above the general level?

A. That floor—the height of the ceiling in this portion is about eight feet.

546 Q. Did you measure it?

A. Yes.

Q. What is the height of the ceiling in the basement, as a whole?

A. The ceiling at this point (indicating), which is the deepest, is eighteen feet.

Q. To the north is how much?

A. It varies as you go down, as you go west, they have changed their floor. This is quite deep (indicating). It is, I would say, fourteen or fifteen feet.

Q. You would say fourteen or fifteen feet would be about your minimum depth of the basement except for the part built up?

A. Yes, I would say twelve to eighteen feet.

Q. And to what extent is this built up?

A. This part is built up (indicating). It is all level.

Q. Above the floor of the basement you said they poured concrete on it?

A. This is on the first floor. This is a concrete floor of the lumber company. They testified this was a concrete floor.

Q. Does that extend into the basement?

A. No. The reason I referred to it was, these additional posts which have been put in there have been put in there to support that floor. This map only shows the original piers. It doesn't show all of these wooden posts which have been added to since it was found necessary to reinforce the floor.

Q. The floor in this area (indicating) is on a level with the floor of the rest of the basement, isn't it?

A. Yes.

Q. There is the same height from the floor to the ceiling of the basement in this area as there is throughout the rest of it, isn't there?

A. No, the height from the floor to the ceiling there is about eight feet.

Q. That is enough to accommodate a car, isn't it?

A. Yes, if you could get it in.

Q. I will hand you exhibit that has been marked "C" and ask you to examine that and state whether you can state what portion of the basement that picture shows?

A. I don't know. I would be positive about that.

Q. It shows some pillars?

A. Yes, sir.

Q. Those pillars are three bricks square, aren't they?

A. Three by three square.

Q. Aren't they only nine inches?

A. No, I don't.

562 Q. Do you know of any other leases made about that time of any warehouse space of comparable type to the lease by the Gray-Cannon Lumber Company?

Mr. Clay: I object to that as assuming that company had a lease. The evidence is they did not have.

The Court: He is asking him if he knows. He can answer that yes or no.

A. I can't recall any at this moment.

By Mr. Smith:

Q. You know there was a distinct shortage of warehouse space or a scarcity in Salt Lake City about November 11, 1942, do you not?

A. Yes, there was a shortage. There was some space available.

Q. Do you know of any space having as much as nine thousand square feet that was empty that was available?

A. Yes, there was.

Q. Can you tell where it was?

Mr. Clay: Object to that as immaterial.

The Court: He may answer.

A. At that time we were making some investigation in connection with government use of space. You haven't asked whether it is comparable. I am going to let you have it.

By Mr. Smith:

Q. May I ask you,—any comparable space?

A. There is not anything I know of that is like the Gray-Cannon Lumber Company, where you have got an office and mezzanine, all that sort of thing. I know nothing of that type.

563 Q. Do you know of any enclosed and heated area having that many square feet vacant?

A. Ten thousand square feet on Pierpont at that time, used by the Electric Supply house down below.

Q. Between West Temple and First West?

A. Yes, sir.

Q. On the ground floor?

A. I didn't inspect it. I was advised there was some there.

You asked me if there was storage. There was. I was advised there was ten thousand square feet of available storage space.

Q. Do you know what that was rented for?

A. I made a memorandum and sent it to one of the other boys. I think they checked it out.

Q. Do you know of any other vacant available warehouse space there?

A. Yes, what we know as the Dinwoody warehouse on Third West had available space, approximately twenty thousand square feet.

Q. What location?

A. That is located between Third and Fourth South, on the west side of Third West.

Q. On the ground floor?

A. Two floors,—ground floor and second floor.

Q. Do you know what rental they asked for that?

A. No, sir, I didn't check it out.

Mr. Smith: ~~That is all.~~

Cross Examination.

564 (By Mr. Nelson:)

Q. Your estimate of the rental value of the Brockbank Apparel premises in the Terminal Building was based on the rental value for general use, wasn't it?

A. Yes, sir.

Q. Without particular reference to the use to which they were placing it?

A. No, sir.

Q. Based upon the space indicated on Exhibit 1 in red?

A. Yes, sir.

Q. Was it also based upon the premise or the assumption that the Brockbank Apparel Company was doing all their own cleaning and repair work as to their occupied portion?

A. It was my understanding they kept their place clean. They cleaned it in the spring when it needed cleaning.

Q. That there was no service of any kind available to the tenants on the part of the landlord?

A. The landlord kept the halls clean and furnished the heat, maintained the exterior of the building in repair.

Q. You think that is all he did?

A. I think that is substantially all.

Q. That is based upon information and belief rather than your own knowledge, isn't it?

A. We had pretty accurate knowledge of that, I think. I wasn't the property manager, but we were informed as to the general service furnished these tenants.

Q. If there were any other services rendered by the
565 landlord it may alter your opinion as to the rental value of the premises, you say?

A. No.

Q. It would not?

A. No.

Q. Don't you think repair work and janitor service, renovating, is worth something?

A. If he gets it from the landlord, yes, it would be.

Q. Would that alter your opinion as to the reasonable rental value?

A. No. I assumed he had the possession of the property with service which we were rendering.

Q. If it were proven to you that he had more services than you assumed, would your opinion be altered?

A. If they were material, I would change it.

Q. Would you consider services such as I mentioned to be material?

A. What is it?

Q. Renovating and repairing the premises.

A. No. I would consider that part of the landlord's work, particularly as to maintaining the general enclosure of the property in order to make it habitable for him.

Q. You assume in this case the landlord did not give such service; is that correct?

A. No. I knew he maintained the building.

Q. You knew he did?

A. Yes. We paid the bills.

566 Q. Did you know he did some work on these premises?

A. No, I have no knowledge of necessary work done.

Q. Your assumption as to the reasonable rental value is based upon the further fact that part of the premises upstairs were vacant, and you have allowed for that depreciation in estimating the rental value, have you?

A. It is a factor, yes.

Q. Did you know those vacant portions of the premises

upstairs were locked off from the occupied portion, not accessible to the public?

A. I know portions of the property could have been entered by people.

Q. Answer my question. Did you know they were locked off, not accessible generally to the public?

A. Yes, I knew they were not shut off; any person could enter in and have access to the halls of that property. They would have to, in order to get to Mr. Brockbank's. I know, as a matter of fact, I have been to the W P A and those doors were open at all times during the day, in order to enter there.

Q. The W P A premises were occupied premises at the time, weren't they?

A. That is true.

Q. The halls were in a sense occupied for the use of the tenants?

A. Yes.

Q. When I refer to unoccupied premises I mean the part not rented?

A. Portions there that could not be locked. Some of those doors didn't have locks on. We had a hard time keeping the boys out who came up there to catch the pigeons, so couldn't be closed off.

Q. There were locks on the doors leading to the unoccupied premises, were there not?

A. I think there may have been some missing.

Q. You don't know?

A. I think there were.

Q. You were not in charge of the property management department, had nothing to do with the property management of the Union Trust Company, did you?

A. No, sir.

Q. That was under Mr. Nielsen's charge?

A. Yes.

Q. When you say "We found out" this and that and the other, you were not referring to the knowledge of the Union Trust Company, the property management department, were you?

A. I wouldn't want to answer for Mr. Nielsen.

Q. You appreciate the fact there is vacant space upstairs might make a difference to some tenants, to others may be of consequence; isn't that true?

A. Many of these bricks are not the new bricks; they are old brick.

Q. These brick in here are only nine inches long, aren't they?

A. The only brick pier I measured in there was three by three feet. I think they are all alike.

Q. Does that picture fairly describe the general appearance of the basement?

A. That is the most desirable space in there for storage purposes.

Q. Can you tell where this is?

548 A. It is in this area (indicating). I would say it is looking towards this wall in this area here (indicating).

Q. That fairly depicts the condition existing, does it?

A. In this area (indicating).

Q. In this area (indicating) you have got fewer posts, haven't you?

A. In this area you have got a rather broken-up situation in which cars could be stored. This is an area in which some wood floor was laid. There is a-raised portion which would have to be torn out before a car could be put in there.

Q. That is a simple matter, to tear those out, isn't it?

A. Have to be taken out.

Q. There are fewer uprights there than in this area (indicating) per square foot, aren't there?

A. No.

Q. You only reflect four in an area of fifty feet by thirty-eight feet, don't you?

A. That is what the map shows.

Q. They are the small pillars, aren't they?

A. The map seems to indicate these are brick piers.

Q. As a matter of fact, you can not state accurately, can you, the number of cars or trucks that could be parked in that basement?

A. Knowing I would have to testify on this matter, I have measured a good many of the spaces and satisfied myself.

Q. Which ones did you measure?

549 A. I have measured all over that basement.

Q. Where will the cars be parked?

A. I have my work sheets here. These areas here are very satisfactory (indicating). However, in this particular case you will note these piers (indicating) come out—this wall extends a distance. This is one of those eight-foot walls. And the best way I can describe it is to say, as the wall comes down it comes out like this (indicating).

Q. That is an eight-foot wall?

A. Yes.

Q. Will you take a look at the map?

A. I wouldn't rely on the map. I would rely on my own measurements. This wall would come down and widen at the bottom. This would extend up eight feet.

Q. Look at the map here and tell the jury what the map shows with respect to the measurements of that wall.

A. The map shows a distance of sixteen feet ten inches.

Q. No; the wall, this wall you are referring to.

A. It shows one foot ten inches.

Q. With respect to these walls I hand you Exhibit D and ask you if that fairly portrays a picture of the wall?

A. Yes, sir. I measured this wall. At this point it is eight feet through.

Q. You said that you figured the rental value of this basement to be two hundred dollars a month; is that right?

A. That is true.

Q. You intend that to be your estimate here, that it was worth two hundred dollars per month?

A. Yes, the maximum rental value.

Q. What do you mean by maximum rental value?

A. That would be the top rental price.

Q. What is the bottom rental price?

A. It was vacant a long time. I think it is worth, over a year's time, \$186 or \$190.

Q. Which month would you say it is worth \$200?

A. I should say the first month.

Q. The first month of the calendar year?

A. The first month the tenant occupied it.

Q. What the second month?

A. That would depend on your tenant, how many cars he would have available to put in.

Q. What would you say?

A. I would say for the average year the rental stipulated for which Mr. Petty rented it was the fair rental value.

Q. You say the first month was worth \$200. What would be the second month's value?

A. \$200.

Q. The third?

A. \$200.

Q. The 4th?

A. \$200.

Q. The 5th?

A. \$175.

551 Q. The sixth?

A. \$175.

Q. Seventh?

A. Yes.

Q. Eighth?

A. Yes.

Q. Ninth?

A. Yes.

Q. In other words, you figured it would be worth two hundred dollars a month for the first four months?

A. Yes.

Q. How much the second four?

A. I have indicated what I thought would be the average for the year.

Q. I am asking you the question.

A. That is what I mean to say. I think \$187 for the year's rental, per month, would be a fair rental.

Q. How do you arrive at the decreasing value,—on what basis?

Mr. Clay: I object to it as immaterial.

Mr. Romney: Going to his credibility.

The Court: I don't think it goes to his credibility. It is very good evidence what it was worth, what you gave for it.

Mr. Romney: I think we are entitled to know how he arrived at his estimate.

The Court: He says he thought the stipulated rent was reasonable.

552 By Mr. Romney:

Q. Do you know what the stipulated rent is?

A. Yes. \$220 for the first four months.

Q. Do you know?

A. Yes. \$220 for the first four months. \$190 for the next four. \$150 for the last four, with the option to renew it one year at \$165 a month.

Q. I am asking you if you will tell me how you figure—why you figure it is worth more immediately after the lease is made than the succeeding period?

Mr. Clay: Object to it as immaterial.

The Court: I think I will sustain the objection. He has adopted your division. Why they did it is a matter, I imagine, of a sort of dickering.

Mr. Romney: We note an exception.

Q. Mr. Kiepe, your estimate of the rental value of the place is based on your judgment that only fifty trucks could be stored in the basement?

A. That's true.

Q. If more than sixty could be stored there it would influence your judgment and your estimate of the rental value, wouldn't it?

A. Yes, if I were convinced that more were there I would think it was worth more.

Q. Your increase in value would go up at least in a similar percentage, wouldn't it?

A. Yes.

553 Q. That doesn't take into account the rooms here which were to be used for parts and accessories, to be utilized for that purpose, does it? Yes or no, please.

The Witness: Will you state the question?

Q. That estimate of the fair rental value doesn't take into account the use of those two rooms for storage of accessories and parts, does it?

A. The rental is based for the whole basement.

Q. That is the estimate you have made?

A. Yes, sir.

Q. Would you say these premises were suitable for the use to which they were being put?

Mr. Clay: Object to that as immaterial. I think it is obvious or the tenants wouldn't have leased it. And it is argumentative.

The Court: With counsel's statement that he concedes it is good for that purpose, there isn't any use of pursuing it.

Mr. Romney: I would like to develop the idea of rental from a different angle.

The Court: Then go right at it.

By Mr. Romney:

Q. Do you know with respect to the availability of suitable space for dead storage of trucks on or about November 11, 1942?

A. Yes, I have some knowledge of it.

Q. Would you state what that was?

A. At that time—

554 Mr. Clay: Object to it as immaterial.

The Court: He may answer.

A. At that time there was scarcity of storage space.

By Mr. Romney:

Q. Do you know whether there was available for such use suitable space comparable to this in the West Temple property?

A. I know of no space comparable to the basement of the West Temple property.

Q. Can you tell me what the reasonable rental value of the basement was on the basis of the square footage available?

Mr. Clay: Object to that as immaterial.

The Court: I think I will sustain that objection.

Mr. Romney: Exception.

Mr. Romney: That is all.

Mr. Clay: I overlooked inquiring of this witness the reasonable value of the Gray-Cannon Lumber Company. It has been called to my attention by Mr. Bachman. I would like to do it now, or after you conclude your cross-examination.

The Court: Yes, you may examine him in advance.

Further Direct Examination.

(By Mr. Clay:)

Q. What, in your opinion, was the reasonable rental value of the premises of the Gray-Cannon Lumber Company in the Terminal Building as of October 11, 1942?

Mr. Smith: I object to that as incompetent, irrelevant, immaterial, the witness not having shown himself qualified to express an opinion as to rental value. His whole
555 qualification goes to appraising property; no mention made of any knowledge of rental conditions.

The Court: The objection is overruled.

Mr. Smith: Exception.

The Witness: Yes, I have an opinion.

By Mr. Clay:

Q. What was the reasonable value, in your opinion?

A. In my opinion the monthly rental of \$115 per month was a fair and reasonable rental as of that date.

Q. In your opinion would the easement or right-of-way to drive cars across the premises of the Gray-Cannon Lumber Company and down the ramp into the building depreciate that value to any extent?

Mr. Smith: Object to that as contrary to the answer he has given.

The Court: He may answer.

Mr. Smith: Exception.

A. I would think that would be detrimental.

By Mr. Clay:

Q. Do you have a judgment as to the detriment in dollars and cents?

A. That would be conditioned upon the extent of that use, and would have to be fixed by stipulating the amount of use.

Q. Be a matter of agreement between the parties?

A. Yes.

Cross Examination.

556 (By Mr. Nelson:)

Q. When you state the rental value of these premises, referring to the Brockbank Apparel Company, was \$22.50 a month—

Mr. Smith: If the court please, Mr. Adams desires to go to California. I would like to cross-examine this witness so he could go, if I might do it, before Mr. Nelson does.

Cross Examination.

(By Mr. Smith:)

Q. Mr. Kiepe, what examination did you make of the premises of the Gray-Cannon Lumber Company?

A. I have been in their property on several occasions.

Q. How recently before they moved?

A. I was in there at the time they were moving.

Q. Had you been there before that time?

A. Yes.

Q. Are you familiar with the office space that company used?

A. Yes; I have been in it several times.

Q. You know it consisted of two rooms?

A. Yes.

Q. A front room and a rear room?

A. Yes, sir.

Q. Mr. Adams' private office in the rear?

A. Very nicely fixed up.

Q. That was a nice office all the way through, wasn't it?

A. Yes.

557 Q. Approximately eighteen or nineteen feet wide and forty-four feet long, for the two rooms?

A. That was approximately right.

Q. Equipped as an up-to-date office, wasn't it?

A. It was very nice for a lumber office.

Q. For the location, it was very nice?

A. Yes, sir.

Q. Have you an opinion as to the rental value of that office space as an office?

A. Yes, I have an opinion.

Q. Will you state what the rental value of that office space was?

Mr. Clay: Objected to as immaterial.

The Court: The objection is sustained.

Mr. Smith: Exception.

Q. Have you computed the reasonable rental value of that space on a footage basis?

A. Yes, I have used that as one of my factors.

Q. Does that include the space occupied by the office also?

A. Yes.

Q. Does the type of office make any difference in that respect in the rental value?

A. Yes, whatever was there would be a factor of value.

Q. You knew the office was air-conditioned, did you?

A. Yes, he had an air-conditioner there.

Q. And that the office walls were insulated?

A. Yes, I knew that. That is, they were built of insulated material.

Q. The warehouse portion of that place was suitable for use as a lumber warehouse, wasn't it?

A. For the purpose for which the tenant was using it, yes. You cannot call it a lumber warehouse in the true sense. It was a small area for that type, when you call it a lumber warehouse.

Q. It had approximately nine thousand square feet of space in there, including the mezzanine floor, didn't it?

A. Yes. The mezzanine would be a little more than testified to here. I think there was about thirty-six hundred square feet in that.

Q. Extended entirely along the west side of Room 100 and all along the back to the east side, didn't it?

A. Yes.

Q. Eighteen feet wide for the length that would be there?

A. I think that is true. However, it was not strongly supported, wouldn't carry great weights.

Q. It did accommodate stacks of windows, window-frames, baskets, boxes and material of that kind?

A. Yes, sir; light material.

Q. Its height was such that driving a truck into the place, materials could be readily passed from the truck to the mezzanine floor?

A. I think that is right.

Q. What is the reasonable square-foot rental value of

the Gray-Cannon Lumber Company premises, if you
559 know?

Mr. Clay: Object to it as immaterial.

The Court: He may answer, if he knows or has an opinion about it and knows how many feet they have got.

A. I would assume that the mezzanine could not be rented separately; it would have to be included in as a factor of value for the ground floor space. It would be computed on the actual ground floor space which they had.

Q. You would ignore the mezzanine space?

A. I would take that into consideration as one of the factors of value for your ground floor space.

Q. What would you say that value is?

A. My opinion would be as Mr. Gaddis'—worth about eighteen cents a year. That includes the mezzanine floor, included in the ground floor.

Q. So the mezzanine floor space at eighteen cents a year—

A. No, sir, you misunderstand me.

Q. The eighteen-cent value would be applicable to the ground-floor space alone, without taking into consideration the mezzanine floor space?

A. No, sir, the eighteen cents a square foot would be the value of the ground floor space with the office and the mezzanine included. If I may make myself clear on that, these people had usable space approximately seven thousand square feet on the ground floor including the office and the driveway and their area-way, and I consider that, with the facilities of the office, the heat, the drive, the mezzanine, all on the basis of seven thousand square feet at eighteen cents a year.

560 Q. In your business of appraising, what rental value places have you appraised—where have you made appraisals of rental value?

A. I have appraised all types of property. In 1942 I appraised the Walker Bank Building, the Judge Building. I appraised warehouses in Salt Lake and in Ogden. I have appraised first, second and third-class stores in Salt Lake City. I have appraised all types of property.

Q. The rental value is largely based on available floor space, isn't it?

A. No, it is not entirely. It is a matter of supply and

demand. It is a question of utility, convenience and type of building.

Q. Based on floor space area primarily, that is the way to compute it,—that is the common way?

A. On estimated value, yes sir.

Q. Did you know when these leases that were made by the tenants that went out of the Terminal Building—what the terms of their leases were?

A. I didn't know they had leases.

Q. The arrangement for occupancy?

A. Yes, I was informed as to what they were. I knew them as we operated and tried to sell the property.

Q. Do you know that the United States government last fall has leased the Produce Row on the south side of Pierpont at 333 to 359 West on that street at the agreed rental of twenty-six cents a square foot for the first year and twenty cents a square foot for the balance of the term?

561

Mr. Clay: I object to it as immaterial.

The Court: The objection may be sustained unless you will certify as to what improvements were undertaken to be made.

Mr. Smith: I think it goes to the witness's—

The Court: I am telling you, now. I don't care what you think. I am telling you in this particular case—somebody testified the government had spent fifty-six thousand dollars already, and some thousands left to be accounted for, putting the property in condition. Unless you will cover the full situation, your question doesn't mean anything.

By Mr. Smith:

Q. In connection with the question I asked you, assume the rental was fixed at twenty-six cents a square foot for the first year to reimburse the landlord for the renovating he did, that the average rental was twenty cents a square foot, that the property is located on the south side of Pierpont, between Second and Third West, facing north, a two-story building; that the ground floor is about four feet above the pavement and that at the rear of the building is trackage; that the building space is divided into separate rooms and that its use by the government is for a storage warehouse. Do you know of that lease?

A. Yes.

Q. For a person operating a factory such as Mr. Brockbank had, it may not make any difference to his utility or usability of the premises?

568 Mr. Clay: I object to it.

The Court: He may answer if he knows.

Mr. Nelson: Isn't that correct?

The Witness: May I ask for the question?

(Thereupon the last question was read by the reporter, as follows:)

"Q. For a person operating a factory such as Mr. Brockbank had, it may not make any difference to his utility or usability of the premises?"

Mr. Clay: I make the further objection, it is argumentative, and calls for a conclusion of the witness.

The Court: It is self-evident it didn't make any difference, because he occupied the premises.

Mr. Nelson: That is all.

Cross Examination.

(By Mr. Jones:)

Q. In view of one answer, so I may get it straight, did I understand you, Mr. Kiepe, to say you didn't know anything about the property management department?

A. No, I didn't say that. It is common for the employees, particularly the heads of departments, to have conferences in an organization like ours, and we acquainted one another with the problems.

Q. As a matter of fact you knew all about it, didn't you?

A. I didn't have the paying or ordering of property management bills or making the payment for repairs, but when repairs were done they were generally discussed, if
569 they involved substantial amounts.

Q. You haven't presumed to testify without rather a complete knowledge of everything there was relative to those premises, have you?

A. I don't know what you mean.

Q. Your official position was sales manager?

A. Yes, sir.

Q. What does that mean?

A. My particular responsibility and my supervision would be over the activity of the sales department.

Q. Did this building come under that department?

A. Yes. It was for sale. We had the responsibility of attempting its sale.

Q. So you knew all about the building?

A. As far as it was necessary for us to know in connection with that we were well informed.

Q. What do you mean, "So far as it was necessary"?

A. I have not testified, and I don't presume to say whether or not, a broom was bought or whether a board was split or what was paid for a watchman this month or what the water bills were this month. I had totals, though. I knew what the operating costs of that building were over a period of years on an annual basis. But I didn't presume to say I know what all the items were that went into it.

Q. I am not arguing with you. I want to know what you mean.

A. I hope that explains it.

Q. Other than those details, you knew all about the property?

A. I think so.

Mr. Jones: That is all.

Cross Examination.

(By Mr. Nelson:)

Q. Mr. Kiepe, did you know—did you have in mind in the estimate of the rental value in connection with the Brockbank Apparel Company that watchman service was furnished during the night?

A. I knew a watchman was engaged by the company to make the rounds.

Q. By the landlord?

A. Yes.

Q. Made the rounds about every two hours during the night?

A. I don't know how frequently he went.

Redirect Examination.

(By Mr. Clay:)

Q. Calling your attention to the basement, I would like to ask if there was an old vault down there?

A. Yes, there is.

Q. Will you describe it?

A. You could only see it was a vault. The doors are off. You can see it was a storage place, the ceiling of it built of stone; the ceiling is arched. It no doubt many years ago was used for valuable records.

Q. Required some space?

A. A small space. The outside dimensions of it would be possibly ten by sixteen.

571 Q. Was there an elevator shaft down there?

A. Yes.

Q. More than one?

A. There is an elevator shaft which went through from the Grimsdell property. That, however, is in disuse. There are posts and so forth which would have to be removed in order to make it available for storage space.

Q. More than one elevator shaft there?

A. I think not.

Q. A ramp comes down in the basement?

A. Yes, the ramp is a long area, supports under it; no cars could be stored there.

(Recess to Two P. M.)

Salt Lake City, Utah, Friday, April 2, 1943: 2:00 P. M.

(After Recess.)

572 WERNER KIEPE, the witness on the stand at the hour of recess, thereupon was recalled for further examination herein, and testified as follows:

Redirect Examination (resumed).

By Mr. Clay:

Q. When we recessed at noon, Mr. Kiepe, you were talking about the ramp going down to the basement of this building.

Will you state, please, if there was enough room under that ramp for the storage of a car or a truck, in your opinion?

A. Under the lower end of the ramp there would be no room to store a car; the incline would naturally prevent it, and also some of the timbering would obstruct the storage of a car there.

Q. Roughly, that ramp running from the main floor upstairs down to the basement would occupy about how much space under the ramp?

A. From floor to floor—I think the measurements are on the map.

Q. Will you refer to it?

A. Eight feet wide, thirty-two feet long from floor to floor. There had been a slight amount of rock and soil put up here to make this join on a little bit, but that is the length of the frame structure.

Q. As I understand, the entrance of that ramp, you enter from Pierpont Avenue across the sidewalk, drove through the middle of the Gray-Cannon Lumber Company premises and down this ramp into the basement; is that correct?

A. That is true.

Q. That driveway across those premises was about how wide?

A. That would depend upon the allowance that would be made. This area would be used for storage, and they would make allowance there at times for cars to pass through, depending on the width of the body.

Q. How close to the office of the lumber company was this driveway? Approximately ran alongside of it, didn't it?

A. Substantially; be a little margin of two or three feet between the wall of the office and the driveway.

Mr. Clay: That is all.

Mr. Smith: May I ask a question with reference to the ramp?

Recross Examination.

(By Mr. Smith:)

Q. Mr. Kiepe, the space to the west of the office and to the east of the mezzanine floor shown on the map opposite the open door here was open space in which the Gray-Cannon

Lumber Company drove its trucks in and out in connection with its business?

A. Yes, they used it.

574 There was no material or warehouse equipment or lumber or other material of that kind piled on the floor within that area at all, was there?

A. Never when I inspected the property.

Q. Their trucks passed in and out of there, as far as you know, at all times?

Q. Yes, sir.

Mr. Clay: Mr. Romney, the last paragraph of this lease recites that because of heavy expense to which you must go to make the entrance to the building and arrange for the storage of our property, "we hereby agree to advance you \$440 as rent for the months of November and December, 1942."

You make no claim as to the \$440 against the government?

Mr. Romney: It is not included, no.

Mr. Clay: That is all.

Mr. Jones: That is all we have.

Recross Examination.

(By Mr. Romney:)

Q. This ramp, you say, is about eight feet by thirty-two feet?

A. That is approximately true, yes, sir.

Q. That would be 256 square feet?

A. Yes, sir.

Q. You said under the lower part of the ramp, where it approaches the floor, no car could be put. The upper part would be high enough so a car might go under, wouldn't it?

A. Yes, my recollection is the nose of a car could be
575 put into this end here (indicating).

Q. With respect to the other area you testified to this morning that the posts were more closely together to support the Grocer Printing machinery, that was a space you calculated 200 square feet?

A. Yes, approximately.

Q. That would make a total for the two of 456. I think you mentioned there was an old vault. Where was that located? Is that shown here?

A. This is the vault, here (indicating). Then the elevator that was spoken of is in here (indicating). This is sort of an old storage room.

Q. What area did you say was occupied by the vault?

A. This is the area, right here (indicating).

Q. What is the measurement of that?

A. My measurement is, I estimated it to be about ten by sixteen, I think.

Q. That would be 160 square feet?

A. Yes, sir.

Q. Then the shaft through which the elevator had come, what did you estimate the measurement of that to be?

A. I would think the elevator shaft was probably six by six.

Q. Thirty-six square feet?

A. Yes, sir.

Q. So those four items would total 656 square feet. Have you calculated it?

A. No, I haven't.

576 Q. Would you look at these figures and see if that is approximately correct?

A. Yes, that is right.

Q. 656 square feet?

A. Yes.

Q. It is a total of twenty-seven thousand eight hundred-odd feet.

A. I think your calculation was different from mine.

Q. Different total area?

A. You talked about outside areas. I talked about inside areas, usable areas. You are talking about outside measurements.

Q. When you refer to these objects being in there that preclude the use of some portions, you had in mind those things you mentioned, this shaft and the vault?

A. Those were minor.

Q. The vault space, I think you testified, could be used for storage, something of that sort?

A. Yes.

Mr. Romney: That is all.

Mr. Clay: That is all.

Mr. Clay: We rest.

The Court: Any rebuttal?

577 O. C. NIELSEN, a witness heretofore duly sworn and examined herein, was thereupon recalled to the stand as a witness on rebuttal by the defendants, and testified further as follows:

Direct Examination.

(By Mr. Jones.)

Q. Mr. Nielsen, you have heretofore been sworn and testified in this case?

A. Yes, sir.

Q. And you are the same Mr. Nielsen who is the property manager for the Union Trust Company?

A. Yes, sir.

Q. I hand you photographs that have been marked Exhibits A to N, inclusive, and I will ask you to look at those, if you will, each one.

Have you examined each one of them, Mr. Nielsen?

A. Yes, sir.

Q. I will ask you if any of those photographs are pictures of any of the premises occupied on November 11, 1942, by any one of the Grocer Printing Company, W. G. Grimsdell, the Independent Pneumatic Tool Company, Mr. Wiggs, Chicago Flexible Shaft Company, or the Galigher Company?

Mr. Clay: I object to that as immaterial. The pictures speak for themselves.

The Court: I suppose it is preliminary to something. No dispute, I suppose, about what you are showing.

He can answer that as a preliminary question

578 No, sir, these are all—the majority of them of the second floor.

Q. Do they represent any condition that was existent in any of the premises of any of the tenants that I have enumerated?

A. No, sir.

Mr. Jones: Merely for the purpose of the record, your Honor,—I think I objected to them before—I make a motion now, as to those defendants, that they be excluded from the record and consideration of the jury.

Mr. Clay: We resist the motion.

The Court: The motion will be denied. We will have to take care of that in the instructions.

Mr. Jones: I just wanted to make the record clear, your Honor.

Q. Mr. Nielsen, as to the parts of the building that the pictures do portray, do they correctly represent the normal condition of those premises as you know them?

A. Well, they all show quite considerable remodeling was commenced prior to the taking of those pictures.

Q. And do they properly represent the true condition of those premises as they existed immediately prior to November 11th?

A. No, sir.

Q. Calling your attention to the Grocer Printing Company, you may state what the condition of the floor was there on November 11th.

The Court: Is that rebuttal?

Mr. Jones: Yes, your Honor. I am directing all this to the testimony of Major Sexsmith and Mr. Kiepe.

The Court: Didn't you² go into that in the main case? Didn't Mr. Grimsdell describe his premises?

Mr. Jones: He just said they were suitable and adequate.

Mr. Clay: That was all gone into on direct.

The Court: I do not remember in detail; but do not repeat.

Mr. Jones: I can be through in five minutes with this witness.

Mr. Clay: As a matter of fact, the major testified in so far as these premises were concerned they were in very good condition.

Mr. Jones: Do you stipulate to that?

Mr. Clay: No, I won't stipulate to anything. That is my recollection what he testified to.

Mr. Jones: Go ahead, Mr. Nielsen.

A. The Grocer Printing Company, the walls—

Q. I am asking you about the floor.

A. The floor on November 11th was practically a new floor. I was authorized by the Metropolitan Life on August 21, 1940, to replace that floor.

Q. Where did Mr. Grimsdell have his office?

A. In the front.

Q. What kind of office did he have?

A. He had a partition back some twenty feet from the front running north and south about twelve or four-
580 teen feet wide, partition running east and west. It was in the southeast corner.

Q. Let me ask you, as to all these premises generally, were they in good condition or above average or below average, or what were they?

A. They were in good condition.

Q. I show you what have been marked as Exhibits 14, 15, 16, and 17, and ask you to look at those, Mr. Nielsen, and if you know, tell me what they represent.

A. They represent the interior of the Independent Pneumatic Tool Company.

Q. Is that a correct representation of the front of the interior as they were on November 11, 1942?

A. That is the way I saw them on that date, or a few days prior to that date.

Q. What condition were the premises there in?

A. I would say they were above average.

Mr. Jones: We offer those.

Mr. Clay: We object to them as not proper rebuttal, and the further objection, even assuming it is proper rebuttal it doesn't tend to rebut anything, because my recollection is that the major who testified here said all of these premises were in fairly good condition.

Mr. Jones: This rebuts Mr. Kiepe.

The Court: What are they marked?

Mr. Jones: 14 to 17 inclusive, your Honor.

The Court: They purport to represent the interior
581 of what?

Mr. Jones: Of the Independent Pneumatic Tool Company.

Mr. Clay: When were they taken, do you know?

Mr. Jones: I don't know. They were taken some time after August, when the repairs were made. The date is on the back—September 14, 1942.

The Court: You object to them?

Mr. Clay: I do, yes, if your Honor please, for the reasons stated.

The Court: I think I will let them in, and let the jury look at them.

By Mr. Jones:

Q. In the Chicago Flexible Shaft Company quarters, the quarters occupied by Mr. Wiggs, what kind of ceiling did that have?

A. That had a new metal ceiling.

Q. What kind of ceiling did Galigher's have?

A. That pressed metal ceiling of the same type.

Q. When was that put on?

A. In the Chicago Flexible Shaft store, I was authorized on December 11, 1939, to replace the defective plaster ceiling with a new metal ceiling and paint the interior.

Q. That is the Wiggs place?

A. Yes.

Q. What about the Galigher?

A. I received my authorization from the Metropolitan Life on February 27, 1939, to replace and install new metal ceiling and paint the interior and replace the defective electric wiring.

582 Q. Was that all done?

A. Yes, sir.

Q. What about the floor in Mr. Wiggs' place?

A. The floor was replaced on—I received my authorization on that on August 21, 1940.

Q. What about the lighting?

A. In Mr. Wiggs', the Chicago Flexible Shaft, that was on December 11, 1939, I received the authorization.

Q. When was the painting of the interior done of these premises?

A. On the various dates. The Chicago Flexible Shaft was done at the same time we replaced the metal ceiling, on December 11, 1939, as well as the electrical work.

Q. And the Galigher?

A. The electric wiring and painting, installing new metal ceiling, considerable items of carpenter work, was authorized on February 27, 1939.

Q. When was it done?

A. Immediately following the receipt of the authorization.

Q. At the Grocer Printing Company the print shop was in the back?

A. Yes, sir, in the back, back of the office, and half of the front, the north of the office, was also used as a print shop.

Q. The Independent Pneumatic Tool, did they have a work shop in the back?

A. Yes, sir.

583 Q. And the Wiggs?

A. Yes, sir.

Q. And what was the Galigher place?

A. The Galigher was one large room. They used practically the entire front on the south side for office space.

Q. All these things you were authorized to do you did?

A. Yes, sir.

Q. Did you do any work on the outside of the building or the roof?

A. The only thing we did was for the protection of the property, on June 6, 1938, I received authorization to repair the fire walls and install new vitreous coping around the entire top of the fire wall.

Q. Explain to us what that means.

Mr. Clay: I object to that as immaterial. I don't think it is rebuttal. I object to it on that ground, too.

The Court: I don't remember anybody for the government stating anything about fire walls.

Mr. Jones: Only the major gave me the impression the building was about to fall down.

Mr. Clay: No.

Mr. Jones: "Haunted house", he called it.

The Court: I noted quite carefully they did not attack the walls.

Mr. Jones: I am perfectly willing to take your Honor's recollection of it, then. We will skip that.

584 By Mr. Jones:

Q. This Exhibit 5, on November 11, 1942, does that correctly represent the outside of the building as it appeared at that time?

A. Yes, sir.

Q. What was the appearance of the Galigher office as an office? Was it above average, below average, average?

A. I would say it was average.

Mr. Jones: I think that is all.

Cross Examination.

(By Mr. Clay:)

Q. Mr. Nielsen, I take it all this repair work you did in 1938, 1939, and 1940 was work that was needed, wasn't it?

A. Absolutely.

Q. And you had to do it to keep your building up?

A. Yes, sir.

Q. Did you increase your rent when you did that repair work?

A. No, sir.

Q. Let the rent stay the same as it was?

A. Yes, sir.

Q. On these photographs—here is a photograph produced by the government, Exhibit 5. That is a fairly good photograph of the exterior of the building of the Galigher Company, is it?

A. Yes, sir.

Q. On the other photographs, aside from the stuff piled on the floor, leaning up against the wall, aside from the fixtures—the bucket and the ladder, do the conditions as portrayed in Exhibit F fairly represent the condition of that building about November 11, 1942?

585

A. If all this material was removed, I would say yes.

Q. Would you make the same answer as to Exhibit N?

A. No, I wouldn't say all that plaster was off of that particular section.

Q. Do you know if Mr. Richards did some repairing about that time?

A. Yes, sir, he started to.

Q. Do you know if his workmen scraped down the walls and scraped off the loose plaster?

A. They had started, worked a few days.

Q. I suppose that plaster needed scraping and cleaning, or they wouldn't have done it?

A. That's right.

Q. Calling your attention to Exhibit J, is there anything in that picture that does not fairly represent the condition of the building on the second floor as of November 11, 1942?

A. I would say that is about the way it was. I can't make out that partition there (indicating).

Q. Apparently a partition has been pulled out and let the two-by-fours stand?

A. It seems they have taken off the lath and plaster on both sides. I can't quite remember of that partition in that condition.

Q. Aside from the ladders appearing in Exhibit M, would you say that picture fairly reflects the conditions as
586 they existed as of that date?

A. Yes, those ladders, and if the place was swept up, that is about what it would look like.

Mr. Clay: That is all.

Mr. Jones: We rest.

The Court: Everybody rest?

Mr. Smith: We rest.

Mr. Nelson: Call Mr. Nielsen for a question in behalf of the Brockbank Apparel Company.

Further Direct Examination.

(By Mr. Nelson:)

Q. Mr. Nielsen, calling your attention to the second floor of the Terminal Building at the time and prior to the taking over by the government, will you state whether or not part of the premises which were unoccupied on the second floor was kept constantly locked off from access to the public?

A. Yes, sir, it was. You are speaking of the unoccupied—

Q. The unoccupied portion.

A. That is right.

Q. In entering the Brockbank Apparel occupied premises, I will ask you whether or not it was the natural means of ingress and egress to go up the stairs and directly into the door of the Brockbank Apparel Company?

Mr. Clay: We object to it. We don't contend it was not the natural means. Stairs leading up there.

The Court: I think it is in evidence the door to the Brockbank room was in front of the stairway.

587 Mr. Clay: That is right.

Mr. Nelson: Exception.

The Court: Isn't that the way the testimony stands?

Mr. Nelson: I believe so in general. I want to clarify it in the mind of the jury, because I think there has been an attempt to show that these unoccupied portions in some way were objectionable to one using these occupied portions.

The Court: If there is any inference of that, clear it up.

Mr. Nelson: You may answer.

A. Immediately at the head of the stairs you would cross a hall about fifteen feet wide, and their door was facing east immediately at the head of the stairs.

Q. And where was the entrance to the unoccupied portion of the premises? Can you point that out here?

A. The stairway went up there (indicating). The Brockbank door was right at the head of the stairs, across this hall. This was blocked off, here, with a solid partition. That is the door that was locked--the handles were gone--it was impossible to unlock it.

The door I used for my regular inspection was right here (indicating), with one of our regular master locks. That was the only access to this whole portion here. Through this door--

Q. Was that door also kept constantly locked?

588 A. Yes, it was our master lock--had to use a master key to go through it.

Q. Point out any other access to unoccupied portions.

A. That was the only way you could go through; come through here (indicating).

Q. From the Brockbank Apparel?

A. Yes. This door was locked with a night lock on the inside. Originally this had a roof over it. We removed that some years ago. The water was gathering in there and damaging the roof. Mr. Brockbank could go through here (indicating), and could open this door and go through this way (indicating), but that was locked continually.

Q. Was there any access to the other side, unoccupied premises?

A. This was occupied by the W P A. They would come through here (indicating). This room and this room were vacant. That was locked here (indicating). These two doors were locked and the handles were gone, so it was impossible to get through.

Q. They were kept locked at all times?

A. Yes, sir.

Q. So you would say that the only portion visible to the public in coming to the Brockbank Company was the entrance hall downstairs and the stairway and the hall here?

Mr. Clay: I think it is leading, and I object to it.

The Court: He may answer.

A. Yes.

589 By Mr. Nelson:

Q. I will ask whether or not you did some repair work recently for part of the premises used by the Brockbank Apparel Company in this building?

A. The only thing we did on the second floor was recondition the two toilet rooms on the second floor. We patched the plaster, repainted the walls and ceilings and woodwork, laid new linoleum in both sides, put the plumbing that was there in workable condition.

Q. How long ago was that?

A. I don't remember whether it was '38 or '39.

Mr. Nelson: I think that is all.

Recross Examination.

(By Mr. Clay:)

Q. I didn't understand your last answer. Is the work you did in 1938 and 1939—was that done just on the Brockbank premises, or on the entire second floor?

A. That was just done in the two small toilet rooms about midway down on the center hall.

Q. Toilet rooms used by Brockbank?

A. No, there were other people from downstairs who occasionally used them.

Q. You fixed the toilets and patched up the plaster?

A. That's right.

Q. And did what else?

A. Painted the walls, ceilings and woodwork, laid new linoleum.

596 Q. At that time you were seeking tenants for the upstairs, were you?

A. No, sir. The demand for additional toilet space from one or two of the tenants downstairs, especially for the ladies,—we decided that was cheaper to repair those two toilet rooms than build additional toilet space on the ground floor.

Q. With respect to shutting off, I didn't get that,—you don't mean to say that the hallways leading to any of these other rooms were entirely blocked off, were they?

A. No; maybe I didn't make myself clear.

From here and over the rooms are wide open to one another. Some of the doors missing, some were off the hinges. From this light well and over, all these twenty-some rooms here, you come up the stairway and Mr. Brockbank would have access to roam around this hall over to this door or over to this one. That is as far as the public would go.

Q. Were those doors locked?

A. Yes, they were.

Q. They were leading to the corridor?

A. To this main corridor.

Q. Which led to the hallway and the other part?

A. Yes, sir. But this was all open. There was no attempt to block off, just to keep it closed here. This was all open (indicating). The doors were off the hinges, standing around the various parts of the building.

Q. When you fixed these toilets, you said for women downstairs, in what business were they employed?

591 A. I don't remember just what tenants it was. We were contemplating this repair work and other additional work downstairs, and necessitated removing some of the toilets in the ladies' side, so we hurried to fix those up and used those temporarily, while this work was going on. And after that I don't know who used them.

Q. It was probably for the purpose of serving any woman employee downstairs in all the offices downstairs?

A. Some had keys, could use them if they had to.

Q. Keys to the upstairs?

A. Yes, sir.

Q. I wondered if it would be necessary for them to go out of their place of employment, out on the sidewalk and up the steps to get to them?

A. Yes, during that remodeling.

Mr. Clay: That is all.

Redirect Examination.

(By Mr. Nelson:)

Q. When you said this portion on the north was open, you had in mind to indicate it was open between the rooms?

A. Yes, sir, between the various rooms on the unoccupied side.

Q. Was there any other access to those rooms other than the locked doors you indicated?

A. No, only one door we could get through was that door on the east wall opposite Mr. Brockbank's door. The other was nailed up solid.

Mr. Nelson: That is all.

592 Mr. Clay: That is all.

Mr. Nelson: No further rebuttal.

The Court: Everybody rest?

Mr. Roberts: If the court please, at this time I was under the impression that the government would introduce the lease which I understand they have. If they are not going to introduce it, I would like to introduce it on behalf of the owner of the building. I haven't a copy.

The Court: Aren't you authorized by your client to dismiss your proceedings as having been settled?

Mr. Roberts: No, I am not. I understand the lease is here. I haven't received a copy of it.

The Court: Your client has. He should know about it.

Mr. Roberts: He has not received it.

The Court: You want to be sure it is settled?

Mr. Roberts: I want to be sure it is settled.

The Court: If they don't convince you, I will submit it to the jury.

Mr. Clay: I thought it was all settled.

Mr. Roberts: Haven't you got the lease?

Mr. Clay: No, I haven't got it.

Mr. Roberts: I understand you have a copy of the lease. You had it here the other day.

Mr. Clay: I had it, but I don't have it now.

Mr. Roberts: It was on the table here the other day. I think it was in the hands of Mr. Jones.

593 Mr. Jones: No, it wasn't. Don't look at me. I don't have it.

Mr. Clay: I haven't seen it since it was on the table. I thought maybe you had it, Mr. Roberts.

Mr. Roberts: No, I don't.

We might stipulate. You say that lease has been signed.

Mr. Clay: I haven't said a word. Mr. Stevens testified to it. I don't know anything about it.

Mr. Roberts: He testified the lease has been executed by the government—that they executed it.

Mr. Clay: That is what he testified to.

The Court: You control your own lawsuit. I will submit it unless they satisfy you. But I am not going to submit it this afternoon, nor before Monday morning. So in the meantime find out where you stand.

Mr. Roberts: I would be glad to do that. We will try to get in touch with Washington and see if we can get a copy of that lease.

Mr. Clay: I think you can get a copy from Mr. Stevens.

(Thereupon the jury was duly admonished and excused until Monday, April 5, 1943, at 9:30 o'clock a. m.)

(Discussion between court and counsel as to information desired by the court.)

594 (Citation of authorities, and argument.)

At this point the further hearing of said cause was adjourned to Monday, April 5, 1943, at 9:30 o'clock a. m.)

Salt Lake City, Utah, Monday, April 5, 1943: 9:30 A. M.

(Pursuant to adjournment, the further hearing of said cause was resumed, and the following proceedings were had.)

Mr. Clay: Comes now the petitioner and moves for a directed verdict against the defendant Gray-Cannon Lumber Company, a corporation, Mr. Wiggs, doing business as the Chicago Flexible Shaft Company, the Galigher Company, a corporation, Mr. Grimsdell doing business as the Grocer Printing Company, and the Independent Pneumatic Tool Company, a corporation.

I have mentioned them all, if your Honor please, except Petty Motor.

The Court: The motion will be denied.

Mr. Clay: Exception.

595 Mr. Roberts: I have a certified copy this morning of lease which has been entered into between the Government and the owners of this building. At this time I would like to offer it in evidence.

The Court: What do you want to offer it in evidence for?

Mr. Roberts: For this reason: it is the theory of the Government that the owners of the building are responsible to the tenants for any damage that they may have sustained by reason of the fact that they were required to relinquish occupancy of the premises.

The Court: That is not included in the lease, is it?

Mr. Roberts: That is why I wanted it introduced in evidence, because it does not include that factor.

Mr. Clay: That is our contention.

The Court: Even if it did, it is pretty late getting around to it.

Mr. Clay: That is our contention; regardless of whether the Government entered into a lease with the owner or not would have nothing to do with it.

The Court: Yes. Do you want that of record?

Mr. Roberts: Yes, I would like to have that.

The Court: Mr. Garnett is right there; he puts down everything you folks say. Does that satisfy you?

Mr. Jones: I understand, Mr. Roberts, the lease is strictly between the United States and the owner of the property and has nothing whatever to do with the tenants.

596 Mr. Roberts: That is right.

The Court: Makes no reference to them.

Mr. Roberts: Makes no reference to them.

The Court: Mr. Clay knows that fact.

Mr. Clay: I haven't read it; never had it in my hand; I don't think it has anything to do with it.

The Court: You are not interested in it?

Mr. Clay: Oh yes, I am interested.

The Court: Are you willing to accept what counsel says it does not contain? If not you better read it.

Mr. Clay: All right, I will read it.

Mr. Jones: Just so the record shows that I take it.

Mr. Clay: It is not clear in my mind—do you still offer this lease in evidence?

Mr. Roberts: Yes.

Mr. Clay: Has the lease been admitted?

The Court: No; I am not going to try that case. If you made a lease that would be—

Mr. Clay: That's right; I don't think the lease has any part in this case.

The Court: You are not contending it creates any obligation by its terms upon the owner—

Mr. Clay: I am not contending anything for it.

The Court: Well, read it.

Mr. Clay: I would rather listen to Mr. Jones's argument.

The Court: I know you had, but you have had that
597 document around here for at least three or four days.
Sit down and read it; we will wait for you; glance through it and see if it makes any reference to these tenants. Sometimes it is necessary for a person to get on one side or the other of a question.

Mr. Clay: If it is material and in evidence, that is different.

The Court: You cannot stay in the middle of the road all the time.

Mr. Clay: I don't want to stay in the middle of the road. I don't think it is material but nevertheless if you think so I would like to stipulate with you the term of this lease: begins November 10, 1942 and ends June 30, 1943, with an option to renew for a period of ten years; and it makes no reference to the tenants.

Mr. Roberts: I think that will be satisfactory.

The Court: All right; then you keep your lease. Now do you dismiss your case?

Mr. Roberts: Yes. At this time, if the Court please, we move for a dismissal.

The Court: Let the case be dismissed as to Willard B. Richards, Jr., and Louise C. Richards, his wife, landlords.

Mr. Clay: We join in the motion to dismiss as against the landlords. Also move to dismiss as to all the defendants.

The Court: Inasmuch as you join in the motion
598 will be sustained; as to the other, it will be denied.

Mr. Clay: Exception.

The Court: Now you may proceed with the argument.

(Thereupon said cause was argued to the jury by counsel for the respective parties.)

(Recess to 1:30 P. M.)

Salt Lake City, Utah, Monday, April 5, 1943: 1:30 P. M.

(After Recess.)

(Thereupon the court instructed the jury as follows:)

The Court: Ladies and gentlemen of the jury:

The Fifth Amendment to the Constitution of the United States, among other things provides that private property may not be taken for public use without just compensation.

There are one or two terms in that language that possibly I should elaborate upon.

Private property,— what is private property, that is, so far as this case is concerned?

The property to be taken by this proceeding against these several defendants, if it is property, consists of the right of each of them to occupy certain portions of the building in question.

599 This is not an action to condemn leases. The government is not interested in Mr. Petty's lease; it does not want it. It is not *condemning* contending Mr. Petty's lease. The fact is, we have been advised the government has made a lease with the owner, Mr. Richards, for a term of years, with the right of extension for a total period, as I recollect the statement of counsel, of ten years.

Now, that is the lease, so far as lease is concerned, that the government is depending upon for the occupation and use of these premises. It is not concerned with any of these leases that any of these parties may have, whether Mr. Petty's or others. Some others, I believe, have written leases. And one of the defendants claims he had a verbal lease covering a period of two years.

Now, it is the opinion of the court, and I so charge you, that

these rights of occupation, whether evidenced by a term lease written or oral, or simply a lease at will from month to month, is property, and private property within the language and meaning of the Constitution.

Other words that have been discussed in the course of the trial and in the argument of counsel before you today are the words used in the Constitution, "just compensation".

Those words are very broad in their meaning. The Constitution of the United States and the Amendments to it fortunately use words as a rule of general meaning.

Now, what is "just compensation"? It can not be defined by me, or any court, so that it would have anything like universal application. "Just compensation" means 600 speaking generally, that the owner who has been deprived of private property for public use by the government shall be compensated in such measure that will constitute "just compensation". Not technical compensation, not compensation along any particular line limited or unlimited, but "just compensation".

Now I take it in these instructions I should tell you that that language is subject to your interpretation under all the facts in this case. That is what you are here for. You are here, having heard the evidence in this case, for the purpose of determining what is "just compensation" for each one of these seven defendants.

Well, you cannot tell about it by just sitting here and never having heard anything about the situation. So I have permitted counsel for the several parties to introduce a wide range of testimony and evidence before you so as to give you a background, if possible, by which you may determine what is, under the circumstances, "just compensation".

Now, before entering into any sort of detail with respect to the evidence that you have listened to, perhaps I should say, and I think it is proper that I should say, that of course a right of occupation or to have these premises in their possession, which is evidenced by a lease, written or verbal as the case may be, has stronger import and is more valuable,—if it is valuable at all,—and a greater liability,—if it is a liability at all,—than holding at will, because both parties.

601 both the owner and the tenant, under a lease for a term are bound by the lease and would be liable in damages if they violated the lease.

Some leases redound to the advantage of the owner of the property and also of the tenant. Some may, under certain conditions, be a liability for the tenant. In the case of a tenancy at will, under the laws of the state of Utah the owner may give notice to the tenant to move out and that notice, if given fifteen days in advance, is binding upon the tenant to move at the expiration of that period. If he does not move he can be put out by action in the courthouse. But nobody else can give that notice. His tenancy is good against all the world, including the United States Government.

The Government of the United States, had it or its agent seen fit to pursue that remedy and that method, could have taken over this property by purchase, or by a lease, as it has done lately, as we are informed. And it would have been in a position, after doing that, to give notice.

But it did not do that. Instead, it brought suit in condemnation, cited these people into court, and a hearing was had on the 10th of last November and order made on the 11th that they surrender the possession to the government under condemnation proceedings.

Now the question arises, of course, in the consideration of this case, what are these tenants-at-will entitled to, if anything? What are these tenants that have leases for varying periods entitled to?

602 Well, the rule of law as being applied by this court in this case is to this effect, that the tenants are entitled to what is being taken away from them, measured in dollars and cents. Now, what is being taken away from them? It is the right to occupy the premises. They were in there on the 11th of November last year when this court made the order that they should surrender the premises to the government, and they had a right to be there. But their tenancy was, so far as those holding under tenancy at will, for an uncertain tenancy. It might last a long time, as it had in many cases, for years and years and years, the testimony shows. On the other hand, it might be put an end to at any time.

When this suit was brought, Mr. Richards owned this prop-

erty. He bought it on the 26th day of October from the Insurance Company. As such, he could have given notice at any time after acquiring the title. He could have sold it to anybody, including the government, who could have given notice at any time.

So that in determining the value of the lease or the right of occupation held by these tenants who were occupying at will, it must be considered in the light of this uncertainty. Those that had a lease covering a term, whether long or short, would be limited by that term, whatever it was.

You have heard the testimony, and doubtless remember who had leases and who did not, and the terms for which
603 they ran.

Now, all of that evidence has been admitted before you for the purpose of giving you a background of the situation here to determine what would be just compensation to these several tenants.

In addition to that you have heard testimony of the various parties as to the expenses incurred in moving and in the improvement or arrangement or rearrangement of new quarters that they had found and which they moved to and are now occupying.

Well, you are not here and you are not called upon to pay them the money back. That is not the issue here, how much it cost them to move, or how much improvements they were required to make in their new home. The question is, what was the value of their tenancy in the Terminal Building? And the purpose of this sort of testimony is to throw light upon that question.

You may have something that is given to you—for instance, suppose a diamond is given to you. That does not give the government or anybody else a right to condemn it and take it away from you. It has a value. The prices of diamonds at the time it was taken away from you might have some bearing upon what you should be paid for the one taken.

That is the purpose of this testimony—no other purpose. It may be in this case that these tenants are better off in their new quarters than they were in their old, both those that had

leases and those who did not. That is for you to say. 604 You have heard where they moved to, how much rent they are required to pay, and the improvements necessary for them to make in order to be able to occupy the premises at all, and all that. But it does not follow, of course, that the government is called upon to pay their rent for any definite length of time, or the difference between their rent and the rent they were paying. That can not be the measure of the rights of recovery. That is not "just compensation". They may be better off where they are than they were there. And if they are, then they should pay their own expenses.

But when you come to consider the case in view of all the evidence in the case, were these tenants paying less rent than they might have been required to pay? Was this loss of the occupation of these premises such that when, having moved, they were required to pay a greater rent than they were paying at the old place, and that the old place was as good or better than the new? And should their tenancy be measured by its value determined in that way?

Now, it is the opinion of the court that all of these matters may be considered by you and all of them that were put in evidence here before you touching this question, without my repeating them here and now, are matters to be taken into consideration in determining whether or not the tenants are entitled, any of them, to compensation because they have been 605 deprived of the right of occupation, and if so, how much?

If they have not been deprived of anything that has value, if they are just as well off as they were before they moved, notwithstanding the expense that was incurred, then they would not be entitled to recover anything, because if they had stayed where they were they would have had to pay the rent that they agreed to pay, and if they had continued to occupy the premises a longer or shorter period, they would have to pay rent every month according to the standard that had been established in each particular case.

Now, they have moved and are paying a different rent to a different landlord at a different place. Was their tenancy, their right to occupy these premises, of a greater value than they were paying?

That is a question for you to determine. What length of time would that occupation fairly and reasonably cover, taking all of the evidence in the case with respect to each individual tenant?

Now you have heard this testimony and it devolves upon you as jurors to settle this dispute between the government on the one hand and these tenants on the other. That is why you are here. And fortunate it is that you are here, and that you can be called for such purpose.

No criticism can be indulged in on the part of anybody, justly, that these tenants come in and make a claim before you. Whether it is reasonable or not, or whether it should be paid, is for you to determine. Nor is the government or its agents to be criticized because they were not
606 able to settle the dispute with the tenants. And I say, it is fortunate in this country of ours that we have got a government that disputes such as this, and others of like and different character may be settled in the courthouse by a jury.

In order for these defendants to recover, respectively, they must make proof to your satisfaction by a preponderance of the evidence.

By a preponderance of the evidence is meant the greater weight of the evidence, that which is most convincing of its truth.

You are the exclusive judges of the credibility of the witnesses and of the facts proven.

In judging of their credibility you have the right to take into consideration their deportment upon the witness stand, their interest in the result of the suit, the reasonableness of their statements, their apparent frankness or candor or the want of it, their opportunities to know and understand, and their capacity to remember.

You should weigh the evidence with respect to each one of the seven defendants and consider all of it together. You should not pick out any particular facts in evidence or any particular statement of any witness and give it undue weight. You should give such weight to inference from the facts proven as in fairness you think they are entitled to.

You should consider all the evidence impartially, fairly, and without prejudice of any kind, and from such consideration, in connection with the instructions given you by the court, you should reach such verdicts—there will be handed you verdicts for each one of the claimants—as will do justice between the parties.

When you retire to consider of your verdicts, you will select one of your members foreman. Your verdicts must be in writing and signed by your foreman, and when he has done so must be returned by you into court.

A concurrence of all of you is necessary in this court.

As stated a moment ago, there are seven separate defendants or tenants in this particular case. Each one of them is entitled to a fair consideration by you of his or its claim, and your verdicts should reflect in each case your honest and impartial judgment.

The Court: I have tried to cover everything I can think of that you people have asked. I don't know whether I have or not. Do you think I have sufficiently covered it to satisfy you?

Mr. Jones: I think generally that your Honor has.

The Court: I think I have covered it broadly. I did not go into all the details that some of you asked, but I think it is covered.

Do you want to take any exceptions?

Mr. Clay: Yes, your Honor.

The Court: You have to do it in the presence of the jury.

608 Mr. Clay: Comes now petitioner and excepts to the court's instructions in this case and particularly that part of the instructions relating to private property where the court told the jury that a lease from month to month is private property within the meaning of the Constitution.

Except to that part of the instructions wherein the court told the jury that the owner of private property, including a leasehold from month to month, is entitled to just compensation.

Except to the court's instructions to the jury that they have the duty of interpreting the legal meaning of "just compensation."

Except to the court's instruction to the jury that a tenancy from month to month is good as against the government, and that the government does not have authority to terminate such tenancy.

The Court: I didn't say that latter part.

Mr. Clay: I don't remember the court's exact language. I meant, that is, in my language, what I thought the court—

The Court: You mean the court made no practical distinction between tenancy at will and tenancy by lease?

Mr. Clay: Yes, that is right.

The Court: Except its uncertainty.

Mr. Clay: Petitioner excepts to that part of the court's instructions, to-wit, that the tenant is entitled to be paid for the right of occupation, regardless if his tenancy
609 is based on a term of years or from month to month.

Mr. Jones: We will have no exceptions to the court's instructions.

The Court: Swear an officer.

(Officer sworn and jury retires.)

Certificate.

610 I certify that the within pages numbered from 1 to 609, inclusive, contain a true and correct transcript of my shorthand notes of the testimony and proceedings in said cause.

E. M. GARNETT,
Official Reporter.

Filed in United States District Court, District of Utah, June 6, 1943. W. E. Wilson, Clerk, by Margaret Johnson, Deputy.

[Clerk's Certificate]

United States of America, District of Utah, ss.

I, W. B. Wilson, Clerk of the United States District Court for the District of Utah, do hereby certify that there is attached hereto the original Official Report of Proceedings Before the United States District Court, District of Utah, in the case of United States of America v. .7 acre of land, more or less, together with the building thereon, in Salt Lake City, Utah, et al., Civil No. 406.

Witness my hand and the seal of the said Court at Salt Lake City, Utah, this 23rd day of August, 1943.

W. B. WILSON, Clerk.

Seal.

Filed Sept. 2, 1943. Robert B. Cartwright, Clerk.

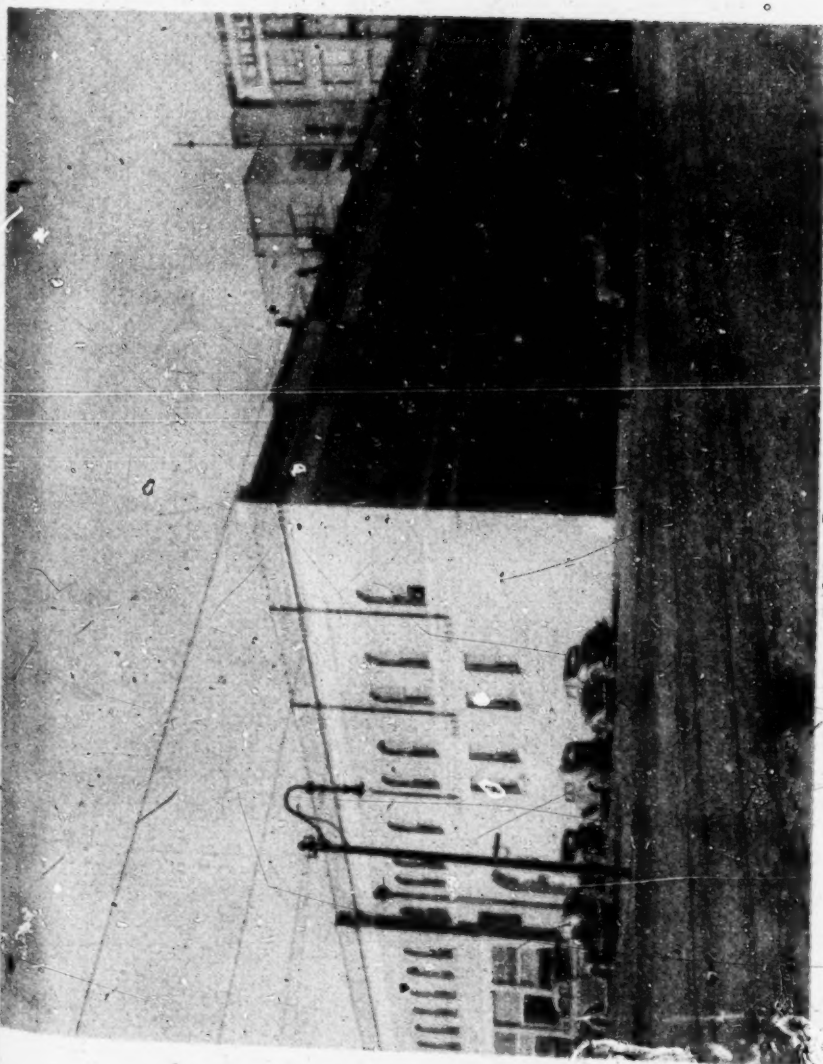
Defendant's Exhibits.

[Defendants' exhibit 1, map of the Terminal Building, does not appear in this record as it is deemed impracticable of reproduction and insertion in the record.]

[Defendants' exhibit 2, summary of moving expenses of Grocer Printing Company, appears at page 184.]

[Defendants' exhibit 3, summary of moving expenses of Independent Pneumatic Tool Company, appears at page 198.]

[Defendants' exhibit 4, summary of moving expenses of Chicago Flexible Shaft Company, appears at page 230.]



Deft's. Ex. 5

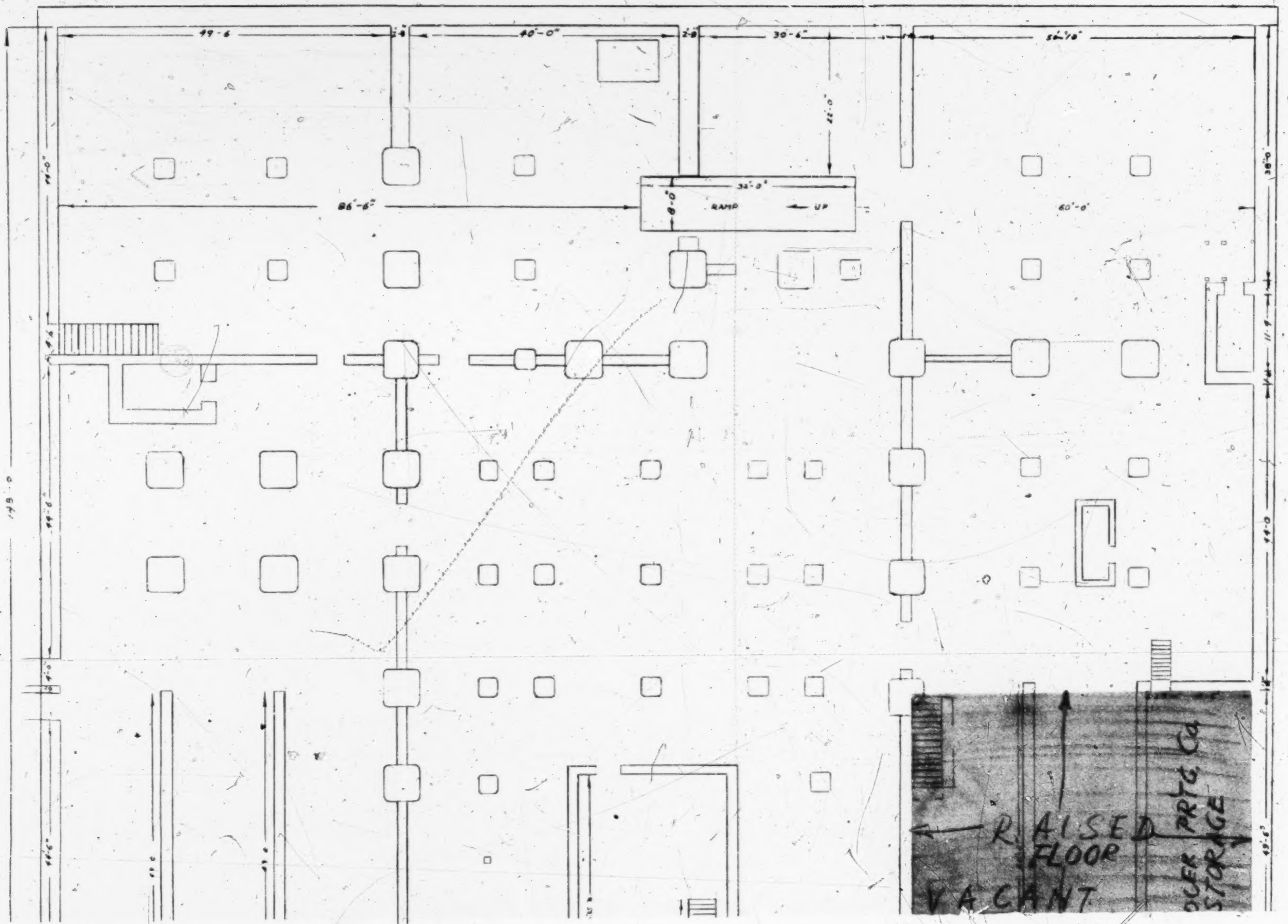


[Defendants' exhibit 6, summary of moving expenses of The Galigher Company, appears at page 268.]

[Defendants' exhibit 7, summary of moving expenses of Brockbank Apparel Company, appears at page 394.]

[Summary relative to defendants' exhibit 8, lease of Brockbank Apparel Company appears at page 395.]

[Defendants' exhibit 9, letter, October 15, 1942, Petty Motor Company to Willard B. Richards, Jr., appears at page 434.]





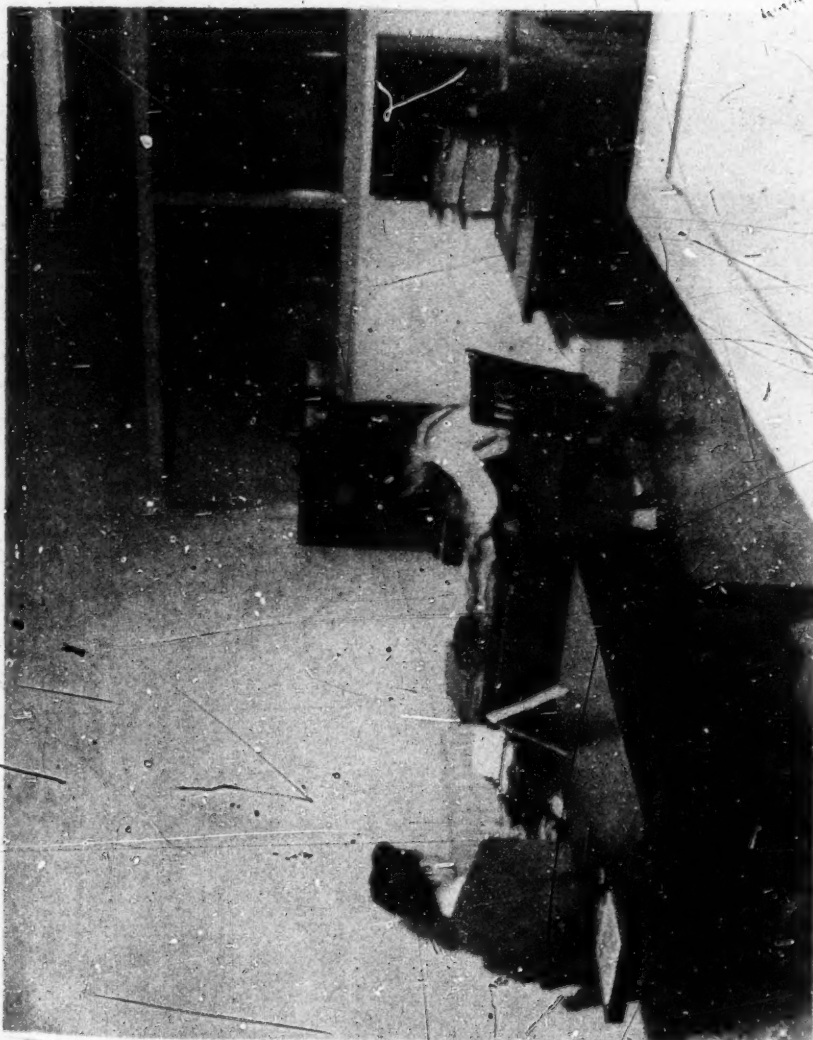
[Defendants' exhibit 11, statement of damage suffered by Petty Motor Company, appears at page 459.]

[Statement relative to defendants' exhibit 12, lease of Independent Pneumatic Tool Company dated October 24, 1939, appears at page 488.]

[Statement relative to defendants' exhibit 13, lease of Independent Pneumatic Tool Company dated July 6, 1942, appears at page 488.]



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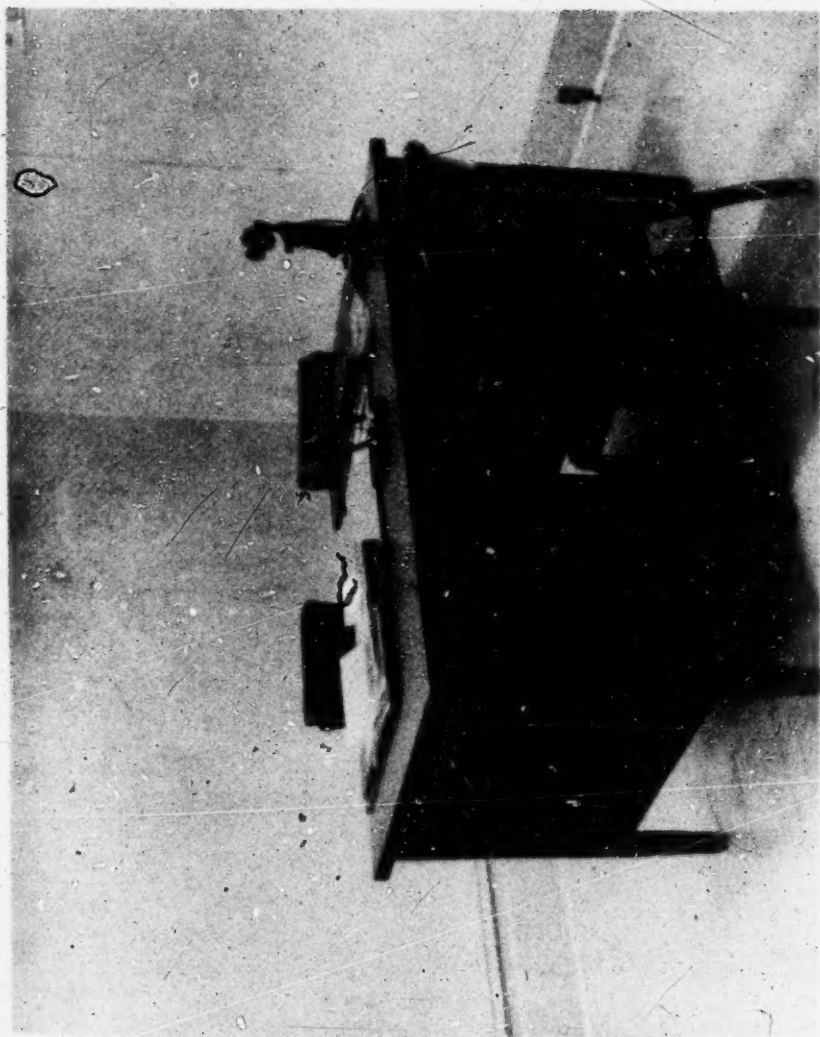
Def't. Ex. 14

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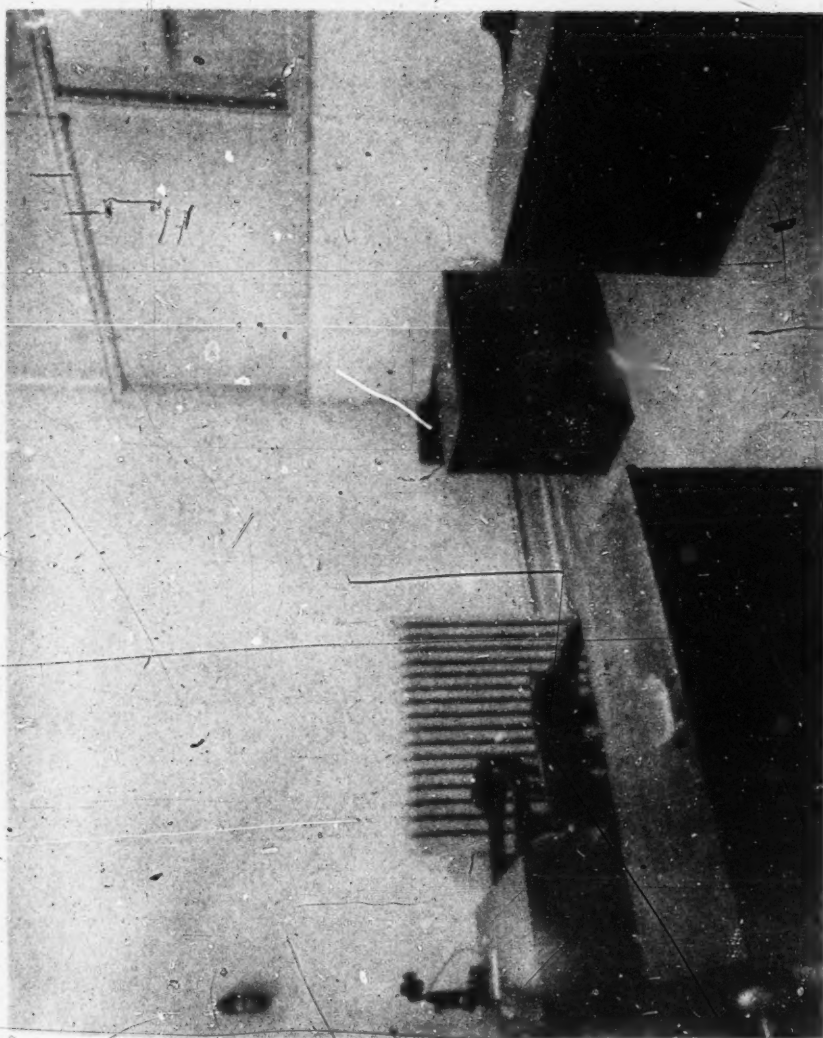




Deft's. Exhibit 15

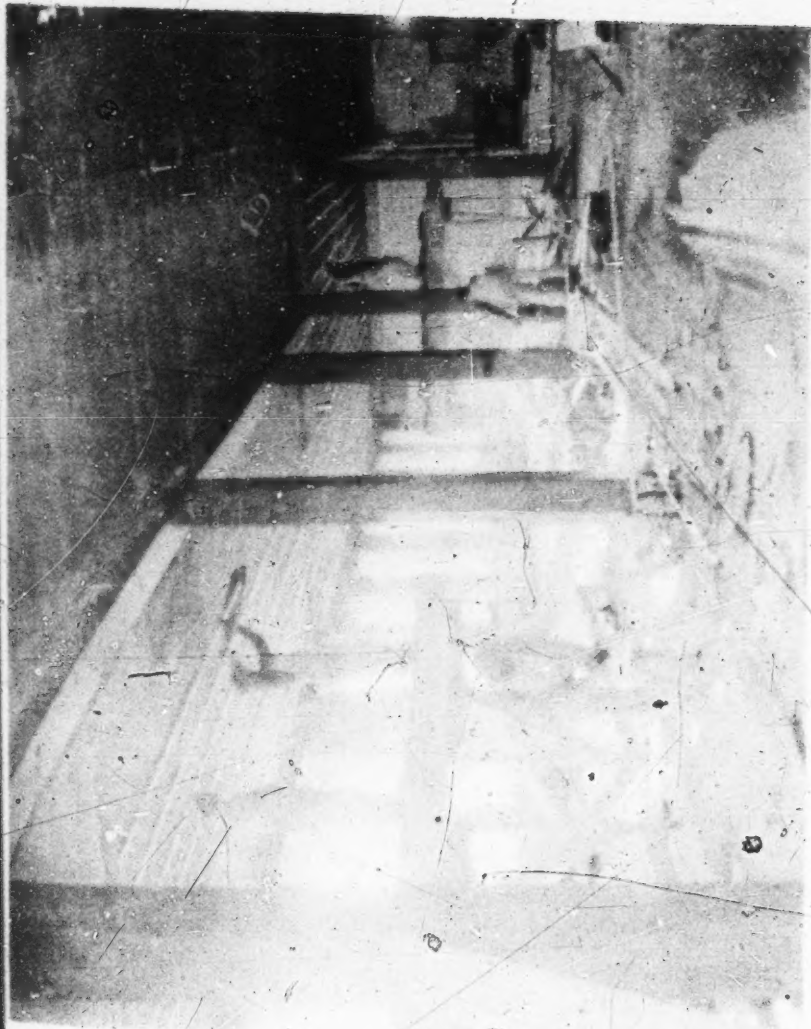


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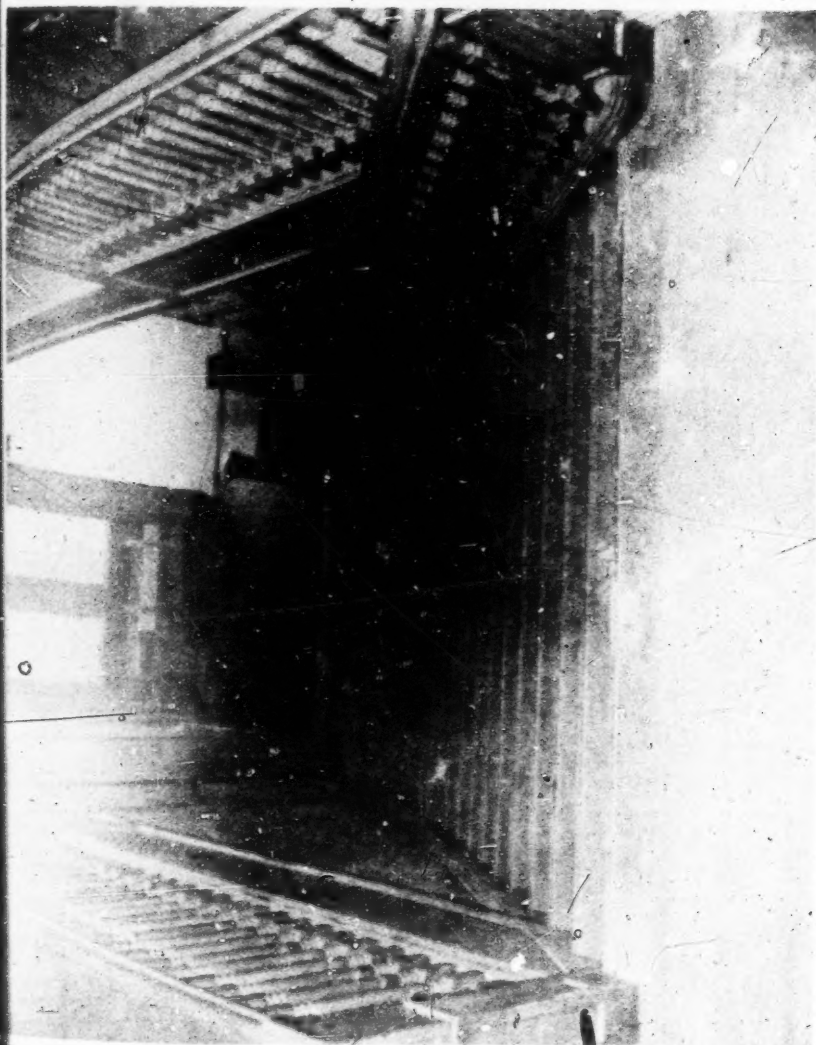


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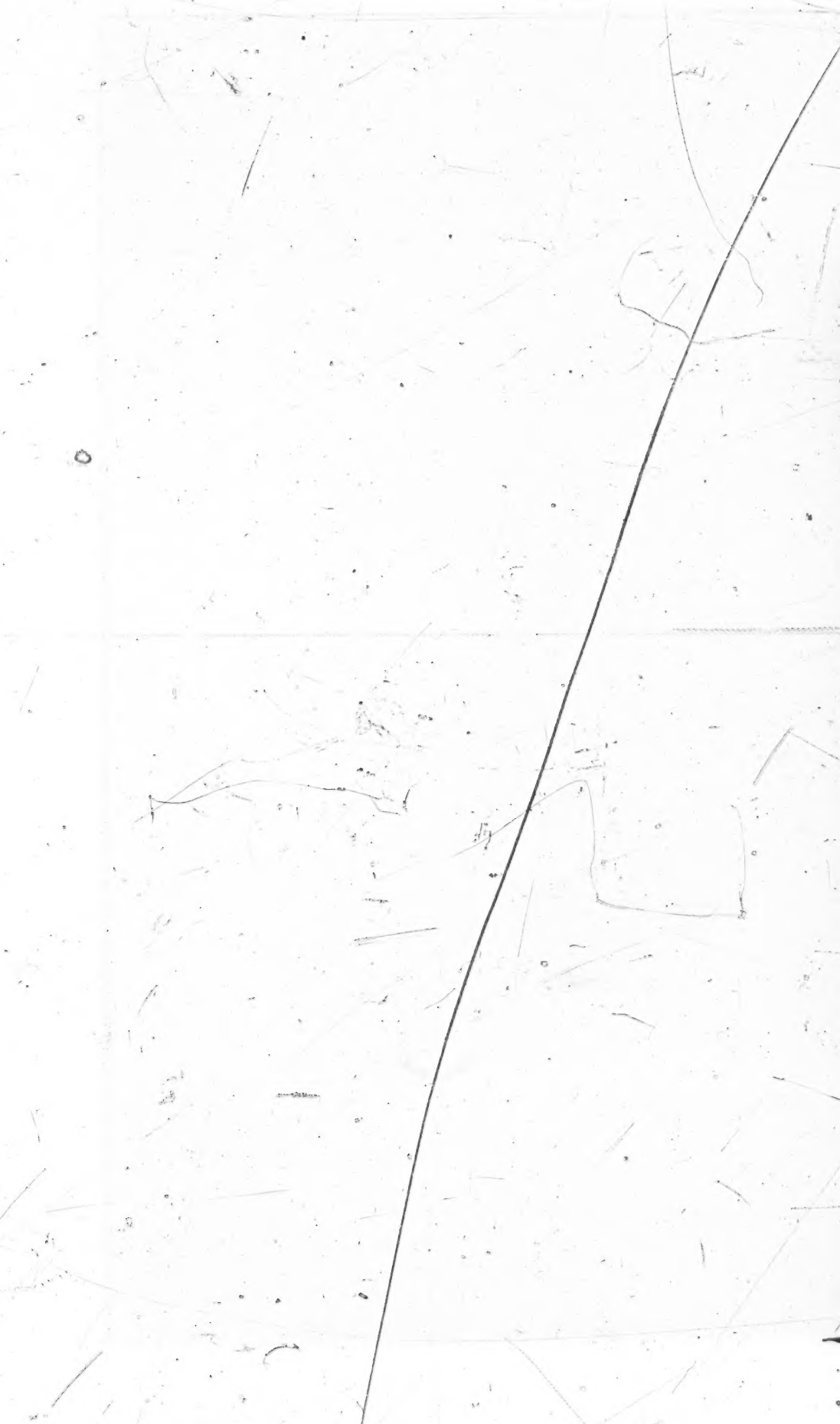


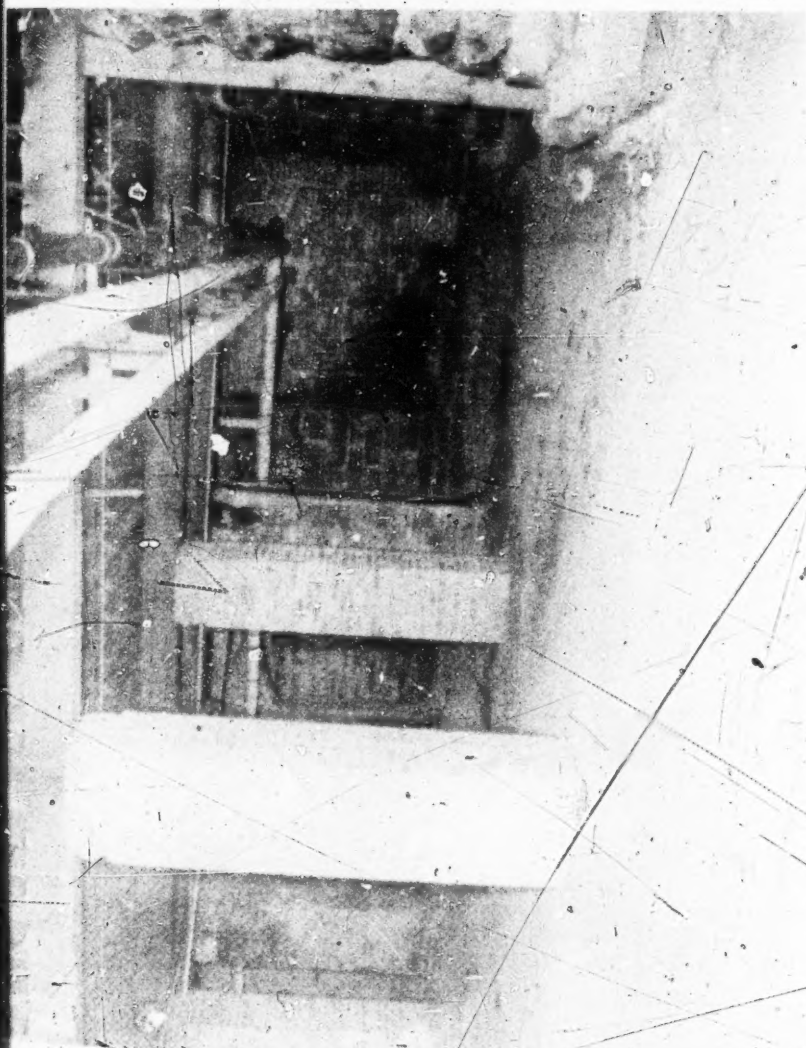


Plt's. Ex. A



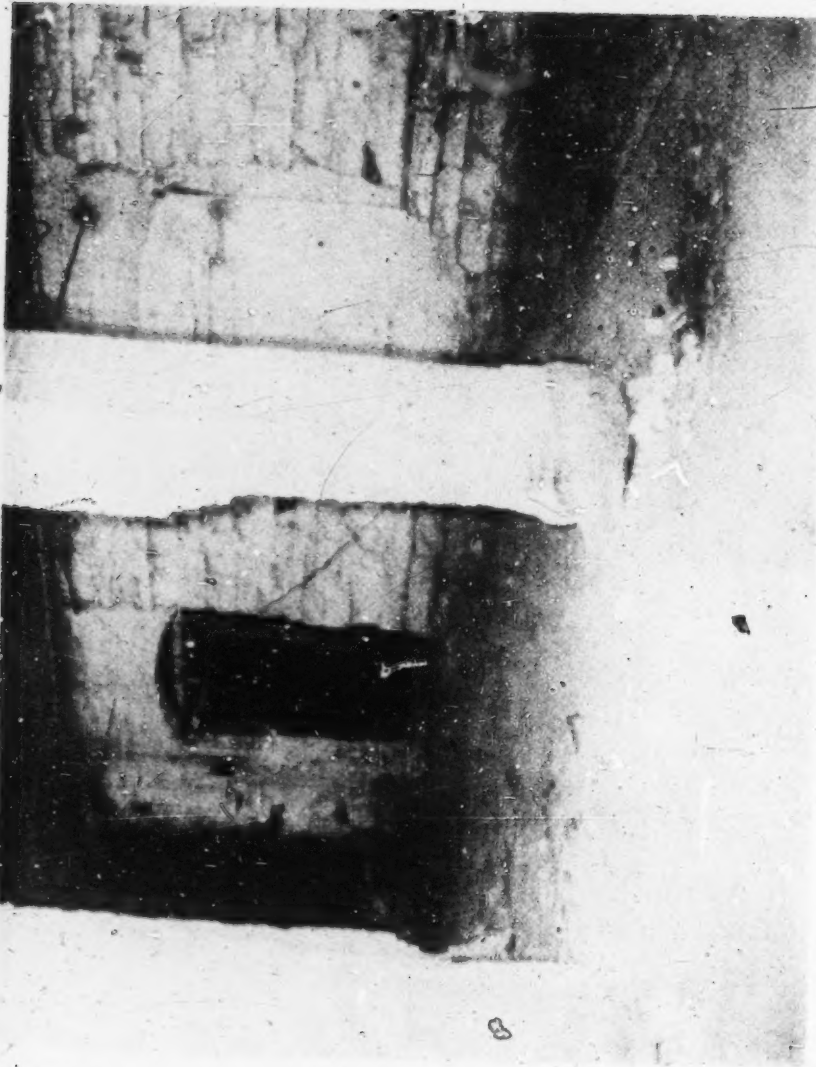
Pl. Ex. B





Pl. Ex. C

603.



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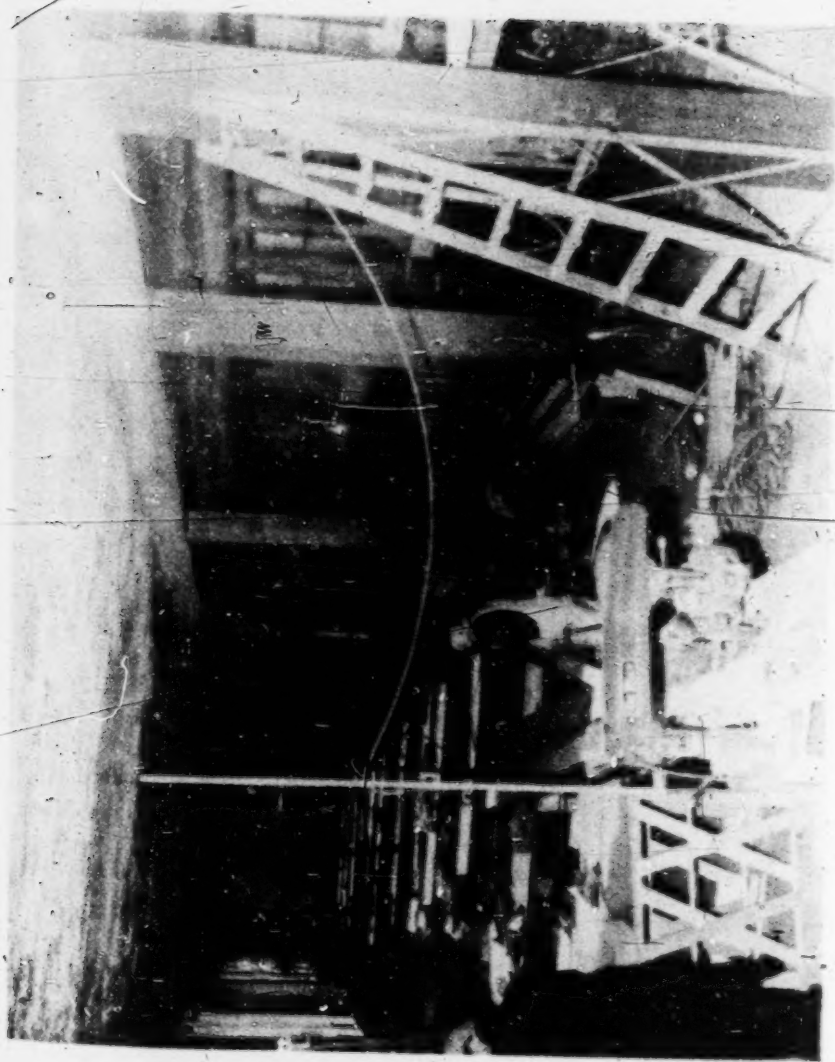
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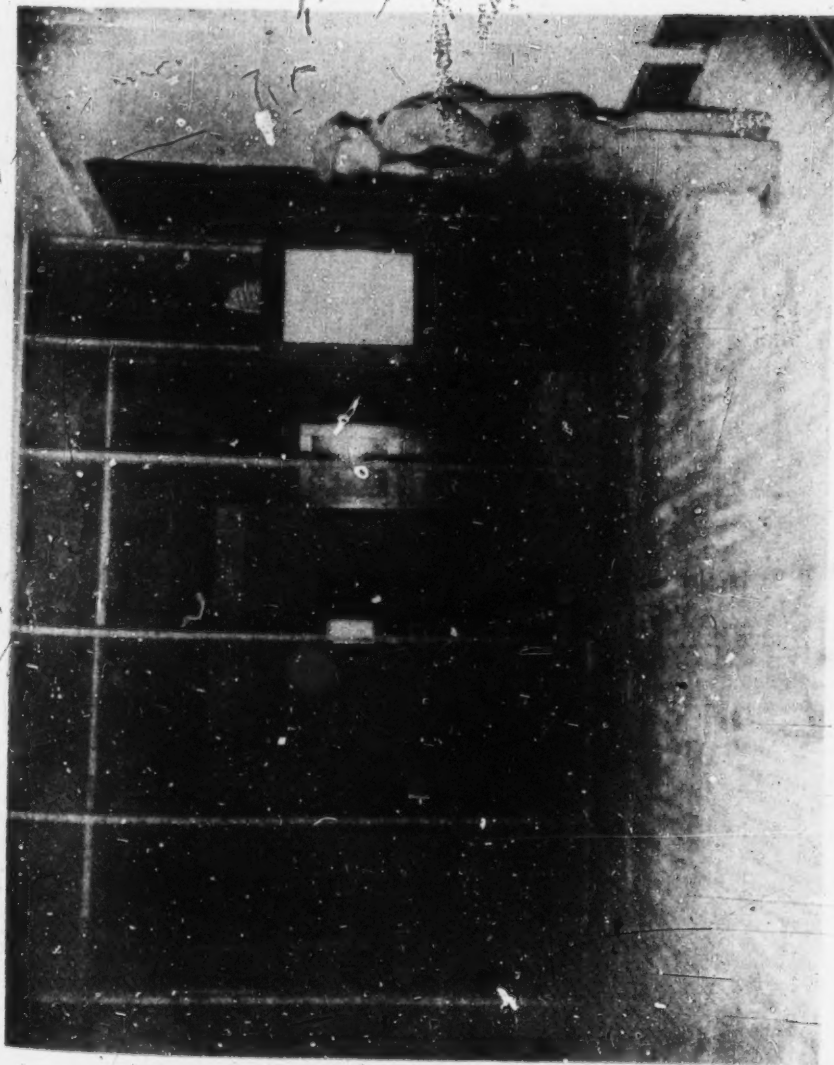


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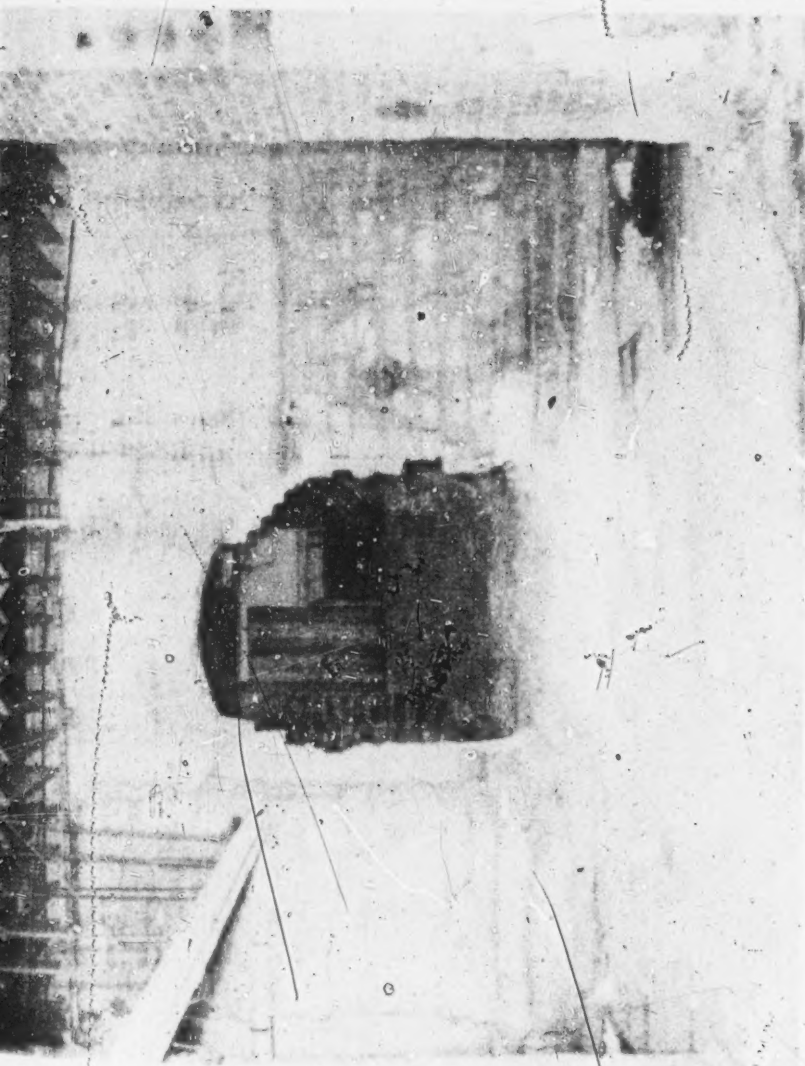
Pl. Ex. C

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Pl. Ex. K

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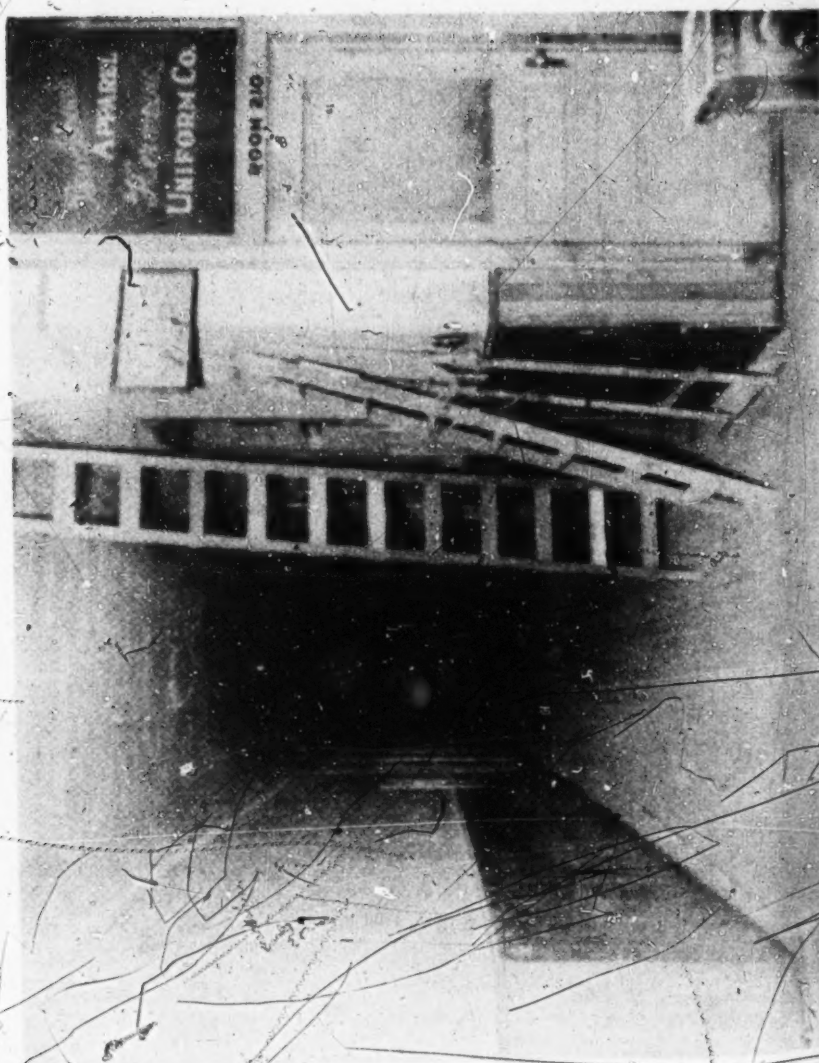
Pl. Ex. D

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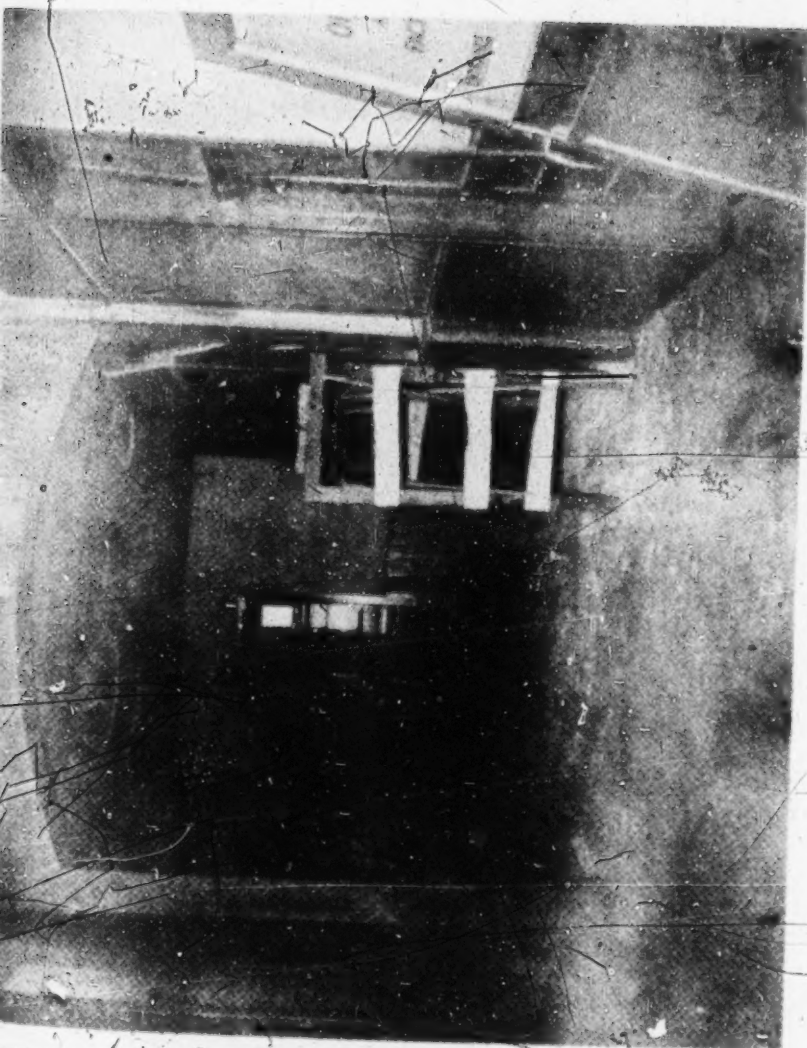


Platf. Ex. 1

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Plt's. Ex. N.



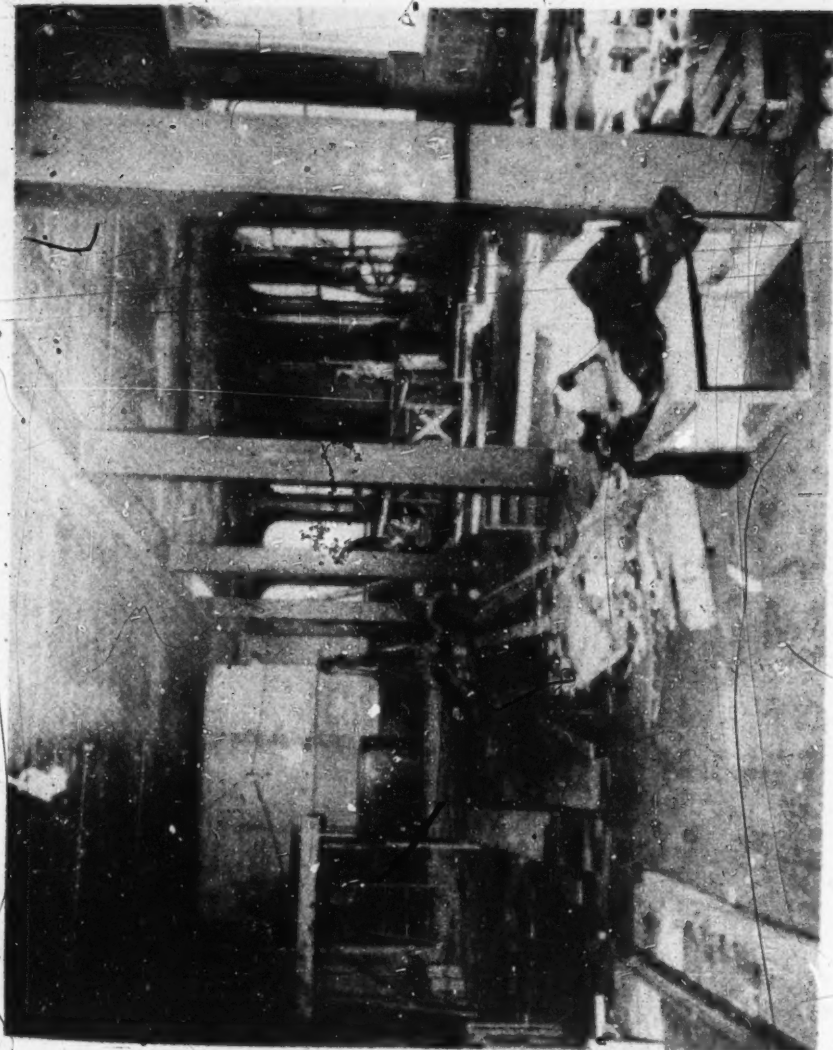
pany, Brockbank Apparel Company, and Gray-Cannon Lumber Company, had no written leases but were in possession and occupied the premises under oral contracts on a month-to-month basis. They were long-time tenants—that is, they had occupied the same premises under the same arrangements with the owner over a long period of time. The arrangement was mutually satisfactory to the tenants and to the owner, and each of the tenants was a satisfactory tenant to the owner. As to each of the oral contracts or leases it is admitted that the owner had the right to terminate said leases under the law of Utah upon giving the required notice. The facts, however, are that the owner gave no such notice. So regardless of what could have been done, each tenant under the oral lease had every reason to think he could remain indefinitely as a tenant, and the record justifies the conclusion that each would have continued for an indefinite period had not the government begun condemnation proceedings.

The Independent Pneumatic Tool Company occupied its space under a five-year written lease. A new lease for a period of five years, beginning December 1, 1942, had been signed by both the owner and the tenant. This lease contained a provision that the term and all rights under the lease would terminate if possession of the premises was taken by a federal, state, or other public authority for public use.

The Petty Motor Company had a written lease on the basement of the building for a term of one year beginning August 1, 1942, with the right to renew for another year.

Before the trial of the cause the government completed negotiations for a lease of the entire building from the owner for a term ending June 30, 1943, with the right of renewal each year for a period of ten years thereafter. The fact that this lease had been procured from the owner by the government developed during the trial. Whereupon, the tenants moved to dismiss as to the owner. The government concurred in this motion, and the court dismissed the proceedings as to the owner. The record discloses that the negotiated lease made no mention of the rights, if any, of the tenants. Admittedly, the negotiated lease and the sum paid to the owner for it made no provision and included no sum as compensation for the interest of the tenants that was taken.

The government took the position below, and adheres to it here, that the amount of the recovery was limited to the value of the occupancy as a unit, to be paid in one lump sum to the owner of the building. That thereafter it, the government, was not interested in the respective claims of the tenants and that their claims



Pl. Ex. H

and rights, if any, were against the award which would be distributed as their interest might appear.

The trial court disagreed with the government's theory. Upon the trial the court permitted evidence on behalf of each tenant of the costs of moving out of the building, remodeling the new premises, reinstalling their equipment, and the increased rents they were required to pay. Witnesses for the tenants acquainted with rental values, after hearing the testimony concerning costs of moving, etc., and being told that they might consider such costs solely for the purpose of determining value, were then permitted to testify as to the value of the tenants' "right of occupancy".

The government's evidence as to value of the interest of each particular tenant was to the effect that the rental being paid by the tenant at the time of his ouster was the reasonable rental value of the space occupied by him. This evidence of the government referred to vacant space considered from a competitive rental standpoint. Under the theory of the government and its evidence none of the ousted tenants was entitled to any compensation.

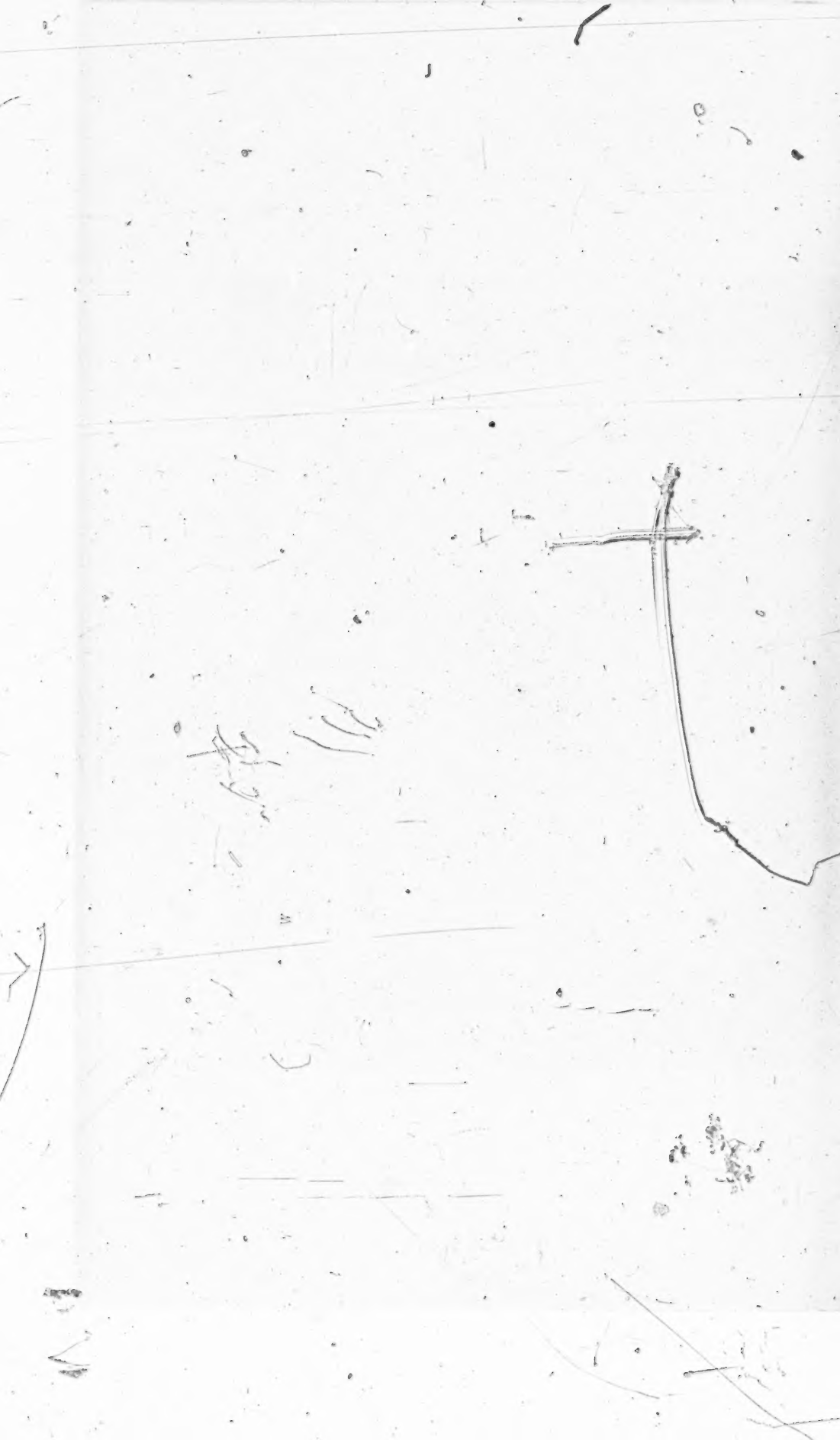
The cause was submitted to the jury under instructions to the effect that in determining the just compensation to be paid each tenant for his right of occupancy they might consider the evidence as to the costs of moving, remodeling, reinstalling equipment, and increased rents. That while these items were not recoverable as such, yet they were proper to consider with all the other evidence in determining the value of their right of occupancy or the just compensation which should be paid to each tenant.

These appeals are concerned primarily with the correctness of the trial court's instructions, which means in its final analysis that these appeals are concerned with the proper method of determining what is "just compensation" as the term is used in the Fifth Amendment of the Constitution, under the facts and circumstances of this case.

The contention of the government that a month to month lease is not property within the meaning of the Constitutional Amendment is foreclosed by the decision of the Supreme Court in the recent case of *United States v. General Motors Corporation*, opinion January 8, 1945 (hereinafter referred to as the *General Motors Case*), wherein it is stated:

"The right to occupy for a day, a month, a year, or a series of years, in and of itself, and without reference to the actual use, needs or collateral arrangements of the occupier, has a value."

The government now contends that the *General Motors Case* in no way affects or changes the rule originally contended for as to the manner of determining just compensation for the



tenants under the facts of this case.¹ The difference in the General Motors Case and the present case is that in the General Motors Case the government was carving out of a long-term lease owned by General Motors, a lease for a short term; whereas, in this case the lease acquired by the government was for a term extending beyond the expiration of the lease owned by each of the tenants, with the exception of the lease owned by the Independent Pneumatic Tool Company, and possibly with the exception of the lease owned by the Petty Motor Company.

The rule announced in a long line of decisions relied upon by the government denies, "consequential damages" when the fee simple title is taken; and the term "consequential damages" comprehends such items as cost of moving, cost of reinstalling equipment, increased rents, etc. In the General Motors Case the Supreme Court was concerned with the adequacy of that well-established rule as applied to a case wherein less than the fee simple title is involved. While adhering to such rule when fee simple title is taken, the court rejected such rule as controlling when less than the fee simple title is taken—for example, when only a leasehold estate is taken. The basic principles announced in the General Motors Case are not confined to the narrow facts involved therein. We are convinced that the principles announced therein are controlling under the facts as presented here. Otherwise, the government would in this case convert the Fifth Amendment from a guarantee of just compensation into an instrument of confiscation.

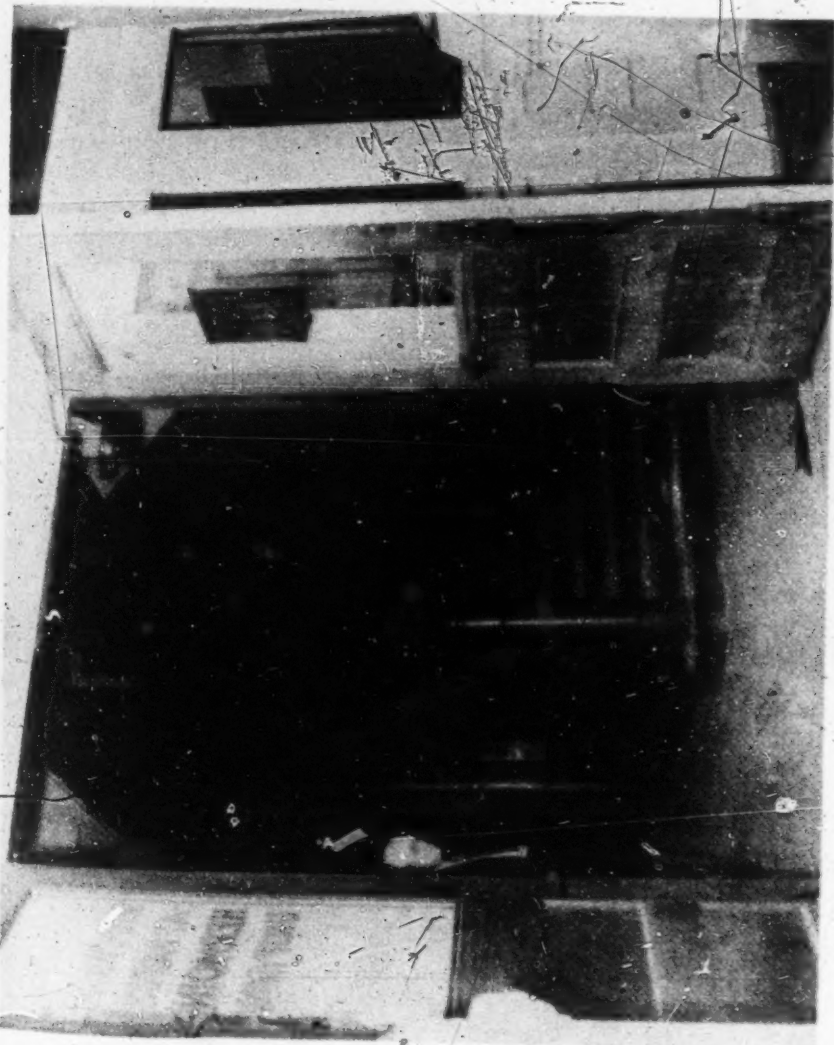
The verdict as to each tenant was much less than the amount claimed—much less than the value of the respective interests as fixed by their witnesses. None of the tenants has appealed.

The record in this case shows that the learned trial judge approached the solution of this case in substantial conformity with the principles announced in the General Motors Case. No doubt if he had had the benefit of the law as announced therein he would have framed his instructions in more precise and accurate language, but when we consider substance rather than form no error is found in the instructions.

The judgment of the trial court is affirmed.

¹ The contention of the government is based upon a long line of cases determining the method of computing just compensation where the fee simple title was taken. *Silberman v. United States*, 131 F. 2d 715; *United States v. Dunnington*, 146 U. S. 338; *Duckett v. United States*, 266 U. S. 149; *Carlock v. United States*, 53 F. 2d 926; *United States v. Miller*, 217 U. S. 369; *United States v. Powelson*, 319 U. S. 266; *Monongahela Navigation Co. v. United States*, 145 U. S. 312; *Mitchell v. United States*, 267 U. S. 341; *Joelin Co. v. City of Providence*, 262 U. S. 668; *Potomac Electric Power Co. v. United States*, 85 F. 2d 243; And the old case of *Graham Bros. Co. v. United States* (5 C. C. A. 284 F. 848, the reasoning of which case was rejected in the General Motors Case.

611



Pl. No. 1

Judgment, Case No. 2820

Sixtieth Day, November Term, Monday, March 5th, A. D. 1945.
Before Honorable Orie L. Phillips and Honorable Alfred P. Murrah, Circuit Judges, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Judgment, Case No. 2821

Sixtieth Day, November Term, Monday, March 5, A. D. 1945.
Before Honorable Orie L. Phillips and Honorable Alfred P. Murrah, Circuit Judges, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Judgment, Case No. 2822

Sixtieth Day, November Term, Monday, March 5, A. D. 1945.
Before Honorable Orie L. Phillips and Honorable Alfred P. Murrah, Circuit Judges, and Honorable Eugene Rice, District Judge.

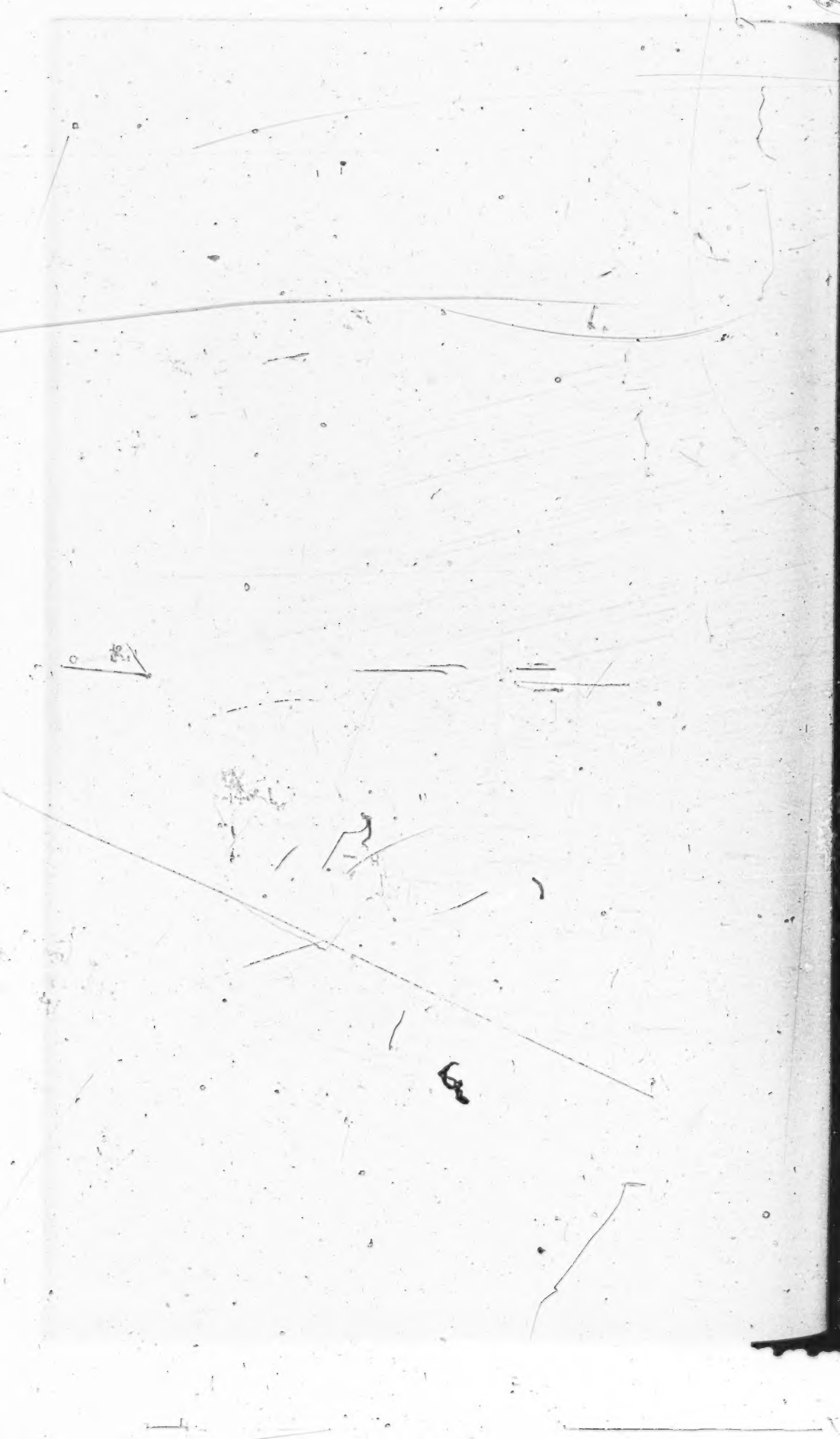
This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

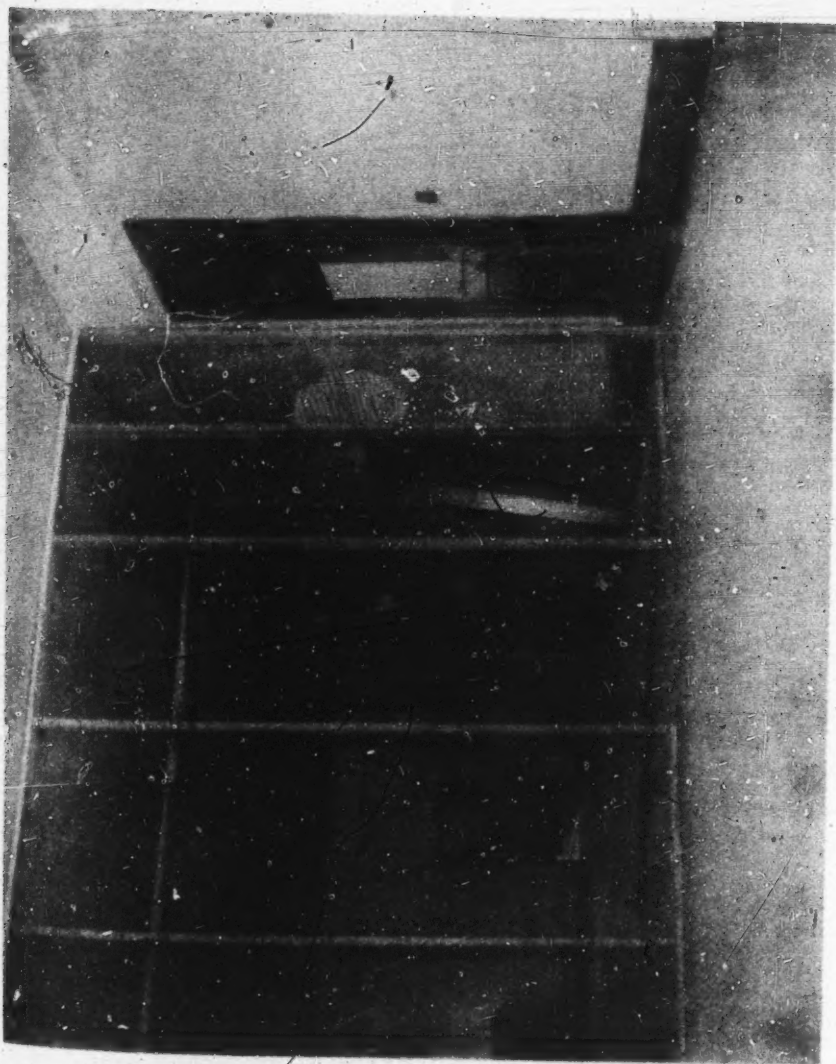
Judgment, Case No. 2823

Sixtieth Day, November Term, Monday, March 5, A. D. 1945.
Before Honorable Orie L. Phillips and Honorable Alfred P. Murrah, Circuit Judges, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.



613



Plat. S. Ex. J

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628

Supreme Court of the United States

No. 77, October Term, 1945

Order allowing certiorari

Filed June 18, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration or decision of this application.

629

Supreme Court of the United States

No. 78, October Term, 1945

Order allowing certiorari

Filed June 18, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration or decision of this application.

630

Supreme Court of the United States

No. 79, October Term, 1945

Order allowing certiorari

Filed June 18, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration or decision of this application.

631 Supreme Court of the United States

No. 80, October Term, 1945

Order allowing certiorari

Filed June 18, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition, shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration or decision of this application.

632 Supreme Court of the United States

No. 81, October Term, 1945

Order allowing certiorari

Filed June 18, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition, shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration or decision of this application.

633 Supreme Court of the United States

No. 82, October Term, 1945

Order allowing certiorari

Filed June 18, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition, shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration or decision of this application.

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634

Supreme Court of the United States

No. 83, October Term, 1945

Order allowing certiorari

Filed June 18, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition, shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration or decision of this application.



And thereafter the following proceedings were had in said causes in the United States Circuit Court of Appeals for the Tenth Circuit:

Order of submission

Thirty-second Day, January Term, Tuesday, March 21st, A. D. 1944. Before Honorable Orie L. Phillips and Honorable Alfred P. Murrah, Circuit Judges, and Honorable Eugene Rice, District Judge.

These causes came on to be heard, Wilma C. Martin appearing for appellant, Shirley P. Jones, Esquire, appearing for appellees.

On motion, appellant was granted leave to file four typewritten copies of a reply brief in these causes instantler, which was accordingly done, twenty printed copies of the brief to be filed at a later date.

Thereupon these causes were argued by counsel and were submitted to the court.

United States Circuit Court of Appeals, Tenth Circuit

Nos. 2820, 2821, 2822, 2823, 2824, 2825, and 2826. November Term, 1944

UNITED STATES OF AMERICA, APPELLANT

v.

PETTY MOTOR COMPANY, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

MERRILL J. BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL COMPANY, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM G. GRIMSDALL, DOING BUSINESS AS GROCER PRINTING COMPANY, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES F. WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE SHAFT COMPANY, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

INDEPENDENT PNEUMATIC TOOL COMPANY, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

THE GALIGHER COMPANY, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

GRAY-CANYON LUMBER COMPANY, APPELLEE

Appeals from the District Court of the United States for the District of Utah

March 5, 1945

Wilma C. Martin (Norman M. Littell, Assistant Attorney General, Daniel B. Shields, United States Attorney, and Vernon L. Wilkinson, Attorney, Department of Justice, were with her on the brief) for Appellant, United States of America.

Shirley P. Jones (Benjamin L. Rich and Gordon R. Strong were with him on the brief) for Appellees: William G. Grimsdell, doing business as Grocer Printing Company; Charles F. Wiggs, doing business as Chicago Flexible Shaft Company; Independent Pneumatic Tool Company, and Galigher Company.

Before PHILLIPS and MURRAH, Circuit Judges, and RICE,
District Judge

RICE, District Judge, delivered the opinion of the court.

On November 9, 1942, the government, acting by authority of the Second World War Powers Act of March 27, 1942, 56 Stat. 176-7 (50 U. S. C., Supplement 2, Section 632), instituted a proceedings in rem to condemn and take possession of a leasehold interest in a certain building located in Salt Lake City, Utah, and known there as the old Terminal Building. The leasehold interest taken gave the United States immediate possession and the right to occupy same as lessee until June 30, 1945, with the right to surrender possession on June 30, 1943, or June 30, 1944, by giving sixty days notice. The building was owned by W. B. Richards, but was occupied by various tenants, and all of the tenants were made parties to the condemnation proceedings.

On November 10, 1942, the government was granted immediate possession, and the tenants were ordered to vacate between November 17th and December 1st.

Of the appellees here, five of them, to wit, The Galigher Company, Grocer Printing Company, Chicago Flexible Shaft Com-

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Judgment, Case No. 2824

Sixtieth Day, November Term, Monday, March 5, A. D. 1945.
Before Honorable Orie L. Phillips and Honorable Alfred P. Murrah, Circuit Judges, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Judgment, Case No. 2825

Sixtieth Day, November Term, Monday, March 5th, A. D. 1945.
Before Honorable Orie L. Phillips and Honorable Alfred P. Murrah, Circuit Judges, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Judgment, Case No. 2826

Sixtieth Day, November Term, Monday, March 5th, A. D. 1945.
Before Honorable Orie L. Phillips and Honorable Alfred P. Murrah, Circuit Judges, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

On April 10, 1945, the mandate of the United States Circuit Court of Appeals in each case, in accordance with the opinion and judgments of said court, was issued to the United States District Court.

*Clerk's certificate**United States Circuit Court of Appeals, Tenth Circuit.*

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the transcript of the record from the District Court of the United States for the District of Utah, and full, true, and complete copies of certain pleadings, record entries, and proceedings, including the opinion (except full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in certain causes in said United States Circuit Court of Appeals, No. 2820, wherein United States of America was appellant, and Petty Motor Company was appellee, No. 2821, wherein United States of America was appellant, and Merrell J. Brockbank, doing business as Brockbank Apparel Company, was appellee, No. 2822, wherein United States of America was appellant, and William G. Grimsdell, doing business as Grocer Printing Company, was appellee, No. 2823, wherein United States of America was appellant, and Charles F. Wiggs, doing business as Chicago Flexible Shaft Company, was appellee, No. 2824, wherein United States of America was appellant, and Independent Pneumatic Tool Company was appellee, No. 2825, wherein United States of America was appellant, and The Galigher Company was appellee, and No. 2826, wherein United States of America was appellant, and Gray-Cannon Lumber Company was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 9th day of May, A. D. 1945.

[SEAL]

ROBERT B. CARTWRIGHT,

*Clerk of the United States Circuit Court
of Appeals, Tenth Circuit.*

By (S) GEORGE A. PEASE,

Chief Deputy Clerk.

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77-83
Nos. 1272-1278

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES OF AMERICA, PETITIONER

v.

PETTY MOTOR COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

MERRILL J. BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL
COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. GRIMSDALL, DOING BUSINESS AS GROCER PRINTING COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES F. WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE SHAFT
COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

INDEPENDENT PNEUMATIC TOOL COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

THE GALICHER COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

GRAY-CANNON LUMBER COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH
CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1944

Nos. 1272-1278

UNITED STATES OF AMERICA, PETITIONER

v.

PETTY MOTOR COMPANY, ET AL.*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments entered in this case on March 5, 1945, by the United States Circuit Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 621-624) is reported in 147 F. 2d 912.

*Besides the Petty Motor Company, the respondents are Merrill J. Brockbank, doing business as Brockbank Apparel Company; William G. Grimsdell, doing business as Grocer Printing Company; Charles F. Wiggs, doing business as Chicago Flexible Shaft Company; Independent Pneumatic Tool Company; the Galigher Company; and Gray-Cannon Lumber Company.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 5, 1945 (R. 625-626). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether tenants occupying property condemned by the United States for temporary use for a period longer than any of the existing leases are entitled to prove moving costs and consequential damages resulting from the moving as evidence of the value of their interests.

2. Whether month-to-month tenants are entitled, upon condemnation of the leased property by the United States, to compensation based upon such indefinite period of time as the jury should conclude the tenants might have continued to occupy the property.

STATEMENT

On November 9, 1942, the United States instituted proceedings under the authority of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, Sec. 201 (50 U. S. C. App., Supp. III, Sec. 632), to condemn for temporary use by the Army a building in Salt Lake City, Utah, known as the Old Terminal Building. The estate sought was a leasehold interest expiring June 30, 1945, with the right of election on the part of the United States to surrender possession

on June 30, 1943, or June 30, 1944, upon giving sixty days' notice. (R. 3-5.)

The building, owned by W. B. Richards, Jr., who had purchased it in October 1942 (R. 179, 211) was partly vacant (R. 353), the remainder being occupied by various tenants. The owner and tenants were made parties to the proceedings (R. 3-5). Upon an order to show cause why immediate possession should not be granted, the trial court, on November 11, 1942, granted the Government exclusive possession and ordered the tenants to vacate their respective premises on certain dates between November 17 and December 1, 1942 (R. 5-8). The owner and seven of the ten tenants (R. 7) appeared and participated in the proceedings (R. 9-52, 89, 149). However, settlement was made with the owner and the appeals in the court below related only to claims of the tenants.¹ Five of the tenants—the Galigher

¹ At a pre-trial conference the Government contended that its liability is limited to the reasonable rental value of the entire building; that when such value of the single property has been determined and paid into court, the Government's obligation is discharged; and that it is not concerned with the apportionment and distribution which thereafter is made between the owner and the various tenants (R. 116, 118-120). See *United States v. Dunnington*, 146 U. S. 338, 350-353; *Carlock v. United States*, 53 F. 2d 926, 927 (App. D. C.); *Silberman v. United States*, 131 F. 2d 715, 717 (C. C. A. 1); *Meadows v. United States*, 144 F. 2d 751, 752-753 (C. C. A. 4) and cases there cited. The district court ruled that there were separate issues between the Government and the owner and the Government and the tenants (R. 38; see R. 136-141). Subsequently, a settlement was reached with the owner whereby he leased the property to the United States, no

Company (R. 245), Grocer Printing Company (R. 158), Chicago Flexible Shaft Company (R. 218), Brockbank Apparel Company (R. 382) and Gray-Cannon Lumber Company (R. 323)—had no written leases but were in possession on a month-to-month basis. The Independent Pneumatic Tool Company had a written lease which provided that the term and all rights under the lease would terminate if possession of the premises was taken by a federal, state, or other public authority for public use (R. 201-202). The Petty Motor Company had a written lease of the basement of the building for a term of one year beginning October 31, 1942, with the right to renew for another year (R. 433-436).

At the trial before a jury, all of the tenants introduced evidence of the expenditures incurred in moving out of the Old Terminal Building, renovating and remodeling the premises to which they moved, and reinstalling equipment at the new premises, and the increased rents they were required to pay at their new premises² (*e. g.*, R.

reference being made to claims of the lessees. The court ordered dismissal of the proceedings as to the owner but no formal judgment has been entered thereon (R. 568-569).

² Some of the tenants introduced evidence of increased rents for the duration of the leases which they claimed they had to execute to obtain their new premises (from one to five years) (R. 186, 195, 230, 269), whereas one tenant who executed a one-year lease for his new location claimed increased rent for 31 months (the duration of the term taken by the United States) (R. 393, 395-396).

184-186, 198, 230, 268-269, 325-336, 394-395, 459).

In addition, F. Orin Woodbury, a real estate agent, testified on behalf of the Grocer Printing Company, the Chicago Flexible Shaft Company, the Galigher Company, and the Independent Pneumatic Tool Company (R. 291-294). Although admitting on cross-examination that a month-to-month tenancy could not be sold in the market (R. 312), this witness expressed the opinion that the "value" of such tenancies was \$4,500, \$7,500 and \$12,500 (R. 293-294). In arriving at this opinion of value he considered the difference between the rents formerly paid at the Old Terminal Building and those paid at the premises to which the tenants moved, the cost of moving and re-installing equipment, the cost of renovating or remodeling the new premises, the comparison between the Old Terminal Building and the new premises, the length of time the tenant had occupied the Old Terminal Building, the locality and the business carried on (R. 293-294, 314). Basing his opinion upon similar considerations, Woodbury valued the interest of Independent Pneumatic Tool Company at \$3,500 (R. 293). Besides the moving costs, Gray-Cannon Lumber Company and the Petty Motor Company introduced evidence of the rental value of their premises (R. 335, 455, 471). Two witnesses for the Government testified that the reasonable rental value of each of the tenant's

premises was no more than the rent being paid at the time of the taking (R. 481-486, 517-518, 539).

At the beginning of the trial, in overruling the Government's blanket objection to all evidence on behalf of the month-to-month tenants and to all evidence of removal costs, the trial court told the jury that whether the tenants had had term leases or occupied the premises from month to month, the measure of their damages would be for the jury to determine; that while the primary question was the loss which each tenant sustained, it would be for the jury to decide whether the measure of damages for the loss should or should not be based upon the cost of moving, the increase in rent, and similar matters (R. 158-161; see also R. 154-155, 167, 172, 195, 223, 287, 297, 323-324, 325, 391-392, 393-394, 444, 447). At the close of the testimony, the trial court instructed the jury to the effect that the tenants' "rights of occupation" had been taken; that such rights, whether under a lease or a month-to-month tenancy, were property rights for which compensation must be paid; and that the measure of just compensation was for the jury to determine considering all the evidence, such as the length of time the building had been occupied by the tenant, the cost of moving, the cost of remodeling and renovating their new premises, the increased rent, whether they were better or worse off in their new premises than in the

Old Terminal Building, etc. (R. 569-574). The Government's objections to the charge were overruled (R. 575-576). Separate verdicts were returned for each tenant and judgments were entered thereon totalling \$10,360 (R. 53-66).

Appeals taken by the United States from the judgments thus entered were briefed and on March 14, 1944, submitted upon oral argument to the circuit court of appeals. No action was taken pending a decision by this Court in *United States v. General Motors Corp.*, 323 U. S. 373. After the *General Motors* case was decided, supplemental memoranda were filed and, on March 5, 1945, the circuit court of appeals affirmed the judgments of the district court (R. 624). In so doing the court below relied entirely on this Court's decision in the *General Motors* case, which was construed as holding that wherever less than fee simple title is condemned the established rule denying recovery of "consequential damages" does not apply (R. 624).

REASONS FOR GRANTING THE WRIT

1. The United States condemned the Old Terminal Building for a period expiring June 30, 1945, with the right to surrender possession on June 30, 1943, or June 30, 1944, upon giving 60 days' notice (R. 3-5). The court below conceded that "the lease acquired by the government was for a term extending beyond the expiration of the lease owned by each of the tenants, with the ex-

ception of the lease owned by the Independent Pneumatic Tool Company, and possibly with the exception of the lease owned by the Petty Motor Company" (R. 624). However, it held that the principles announced in *United States v. General Motors Corp.*, 323 U. S. 373, were controlling whenever the United States condemns less than the fee simple title and consequently that the district court was correct in allowing the jury to consider the costs incurred by all of the tenants in moving, the cost of renovating and remodeling the premises to which they moved, the cost of reinstalling equipment and the increased rents they were required to pay at their new premises (R. 624). The Government carefully objected to the introduction of such evidence, as the following colloquy between the district court and Mr. Clay, counsel for the Government, reveals (R. 159, 161):

MR. CLAY. Mr. Jones [counsel for four of the respondents] suggests we make a blanket objection to any evidence which would support or might tend to support any of the allegations of the answer. If that is not too broad and the court wants to rule on it now, we will except, and won't interrupt any more.

THE COURT. It may be so understood, it being understood that your objection goes to the proposition that because they did not have a term lease they are not entitled to recover anything.

Mr. CLAY. That plus the fact that under no circumstances would they be entitled to recover the expense of moving or any expense incurred in the new location.

* * * * *

The COURT. You object to all that [evidence of cost of moving, the difference in rent, the cost of reinstalling equipment, etc.] because they didn't have a lease, term lease?

Mr. CLAY. That is right.

The COURT. It may be so understood. [See also R. 154-155, 167, 172, 195, 223, 287, 323-324, 325, 391-392, 393-394, 444, 447.]

In the *General Motors* case, the question was what is the proper measure of compensation when the temporary occupancy of a building is taken from a tenant holding under a long term lease who is obligated to continue paying rent under the terms of his lease during the Government's occupancy and who presumably would return to the building upon the termination of the Government's use. The decision in that case not only reaffirmed the rule that the expense of moving removable fixtures and personal property from the premises and other like consequential losses cannot be considered when the United States condemns the fee, but it also held that "When it [the Government] takes the property, that is, the fee, the lease, whatever he [the citizen] may own, terminating altogether his interest, under the es-

established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases." [Italics supplied.] 323 U. S. at pp. 379-380, 382. It is only "when the Government does not take his entire interest, but by the form of its proceeding chops it into bits * * * and leaves him holding the remainder" that the cost of moving out is to be considered in determining "what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier" (323 U. S. at p. 382).

The entire interests of the tenants in this case have been taken. They will have no terms remaining after the temporary occupancy condemned by the Government expires. They are in the same position they would have occupied had the Government taken the fee. Consequently the decision of the court below, rather than being supported by this Court's decision in the *General Motors* case, is contrary to it.

A word should be added concerning two of the leases. As has been said, the court below conceded that the entire term of most of the tenants had been taken, but it held that the Independent Pneumatic Tool Company lease and "possibly" the Petty Motor Company lease were for terms longer than the temporary use taken by the Gov-

ernment (R. 624). The Independent Pneumatic lease provided that:

If the whole or any part of the demised premises shall be taken by Federal, State, county, city, or other authority for public use, or under any statute, or by right of eminent domain, then when possession shall be taken thereunder of said premises, or any part thereof, the term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease. (R. 202).

A tenant whose lease provides for its termination upon a sale of the property by the owner or upon the taking of the leased premises for a public use, is entitled to no compensation when it is condemned.³ Although the court below referred (R.

³ *United States v. Improved Premises*, 54 F. Supp. 469 (S. D. N. Y.); *United States v. Certain Parcels of Land in Loyalsock Township, Etc.*, 51 F. Supp. 811, 812 (M. D. Pa.); *United States v. Inlots*, 26 Fed. Cas. No. 15441a, at page 492 (C. C. S. D. Ohio); *Goodyear & Co. v. Boston Terminal Co.*, 176 Mass. 115; *In re Improvement of Third Street*, 178 Minn. 522; *Matter of Mayor of New York*, 168 N. Y. 254; *In re Water Front in Tompkinsville, Etc.*, 219 N. Y. App. Div. 387; *Scholl's Appeal*, 292 Pa. 262; see *In re Water Front*, 246 N. Y. 1, 31-34, certiorari denied, 276 U. S. 626; cf. *Zschendorf v. Cott*, 259 Mich. 561; *United States v. 3.5 Acres of Land in South Boston, Mass.*, 57 F. Supp. 548 (D. Mass.); *American*

622) to this clause in the lease of Independent Pneumatic Tool Company, it did not give any reason or cite any authority to support the view that, despite this clause, the tenant's interest was not terminated by condemnation. The *General Motors* case does not warrant such repudiation of a lease clause as to permit a tenant whose interest has terminated to secure compensation. *United States v. 21,815 Square Feet of Land in Borough of Brooklyn*, 59 F. Supp. 219 (E. D. N. Y.).

The Petty Motor Company had a lease for one year expiring October 31, 1943, with the right to renew for another year (R. 433-436). The Government took the premises until June 30, 1945, but it could have surrendered possession on June 30, 1943 or 1944 (see R. 3-5). The circuit court of appeals stated that this lease was a "possible" exception to those which terminated prior to the expiration of the use taken by the United States. However, because of the construction given to the

Creameries Co. v. Armour & Co., 149 Wash. 690; *Boston's Talbot*, 206 Mass. 82. Many of these decisions arose on apportionment of the total award for the property between the owner and his tenant. In view of the fact that the settlement made with the landlord in the instant case did not require the owner to indemnify the Government from claims of lessees (cf. *Loyalsock Township case*, *supra*, p. 11), the United States does not deny that it is primarily liable to the tenants. It does contend, however, that the measure of the tenants' recovery against the Government is the same as it would be upon apportionment of an award representing value of the entire property.

General Motors decision, the court below did not pass upon this question. It is submitted that the taking by the United States of more than 31 months' occupancy (from November 11, 1942, through June 30, 1945) terminated altogether the Petty Company's interest, even though the Government's occupancy might have been relinquished earlier. The Petty Company would of course be entitled to compensation for the remainder of its lease, which had almost a year (November 11, 1942–October 31, 1943) to run.

Moreover, the court below held that whenever less than fee simple title is condemned the established rule denying recovery of "consequential damages" does not apply. It apparently believed the *General Motors* decision limited cases such as *Mitchell v. United States*, 267 U. S. 341, to instances where fee title is taken. See R. 624. On the contrary, in the *General Motors* case, this Court held that even when, as there, a temporary period for less than the term of an existing lease was taken "proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent * * * must be excluded from the reckoning" (323 U. S. at p. 383). Many of the items which the lessees were permitted to introduce in evidence, despite the Government's objections, represented consequential damages rather than expenses of moving their property out of the premises.* This aspect of the

* For example, the jury was permitted to consider the increased rent which a month-to-month tenant of the Old Terminal Building had to pay for 5 years under a lease for his new premises (R. 186), the cost of remodeling the new

decision reflects, it is believed, a further misapprehension of the *General Motors* case, and calls for review by this Court.

2. An additional question is raised by the treatment of the month-to-month tenancies. Although recognizing that these tenancies might be terminated at any time by the owner upon 15 days' notice, the district judge did not limit the compensation of those tenants to the value, if any, of their actual term (see R. 140-141; 570-571). Instead, he instructed the jury that while the tenancies were uncertain, they might last a long time, "for years and years and years" (R. 571) and submitted for determination by the jury "What length of time would that occupation fairly and reasonably cover, * * *

(R. 574).⁵ The circuit court of appeals, referring to the fact that the tenants had occupied their premises for many years, that the arrangement was mutually satisfactory to the tenants and the owner, and that the tenants had every reason to think they could remain indefinitely, charac-

premises (R. 167, 196, 228), the cost of renovating a sign used by a tenant at the old premises which "was kind of worn out, been up for a long time" (R. 177), the cost of photographs of a tenant's new location to send to the main office of the company (R. 200-201), and the cost of changing advertising cuts (R. 256).

⁵ This instruction related only to the tenancies from month to month. The tenants claiming under written leases were permitted to recover only for the unexpired terms of their leases (R. 572).

terized the claimants as "long-time tenants" and stated that "the record justifies the conclusion that each would have continued for an indefinite period had not the government begun condemnation proceedings" (R. 622).

These rulings disregard the fact that the just compensation provision of the Fifth Amendment is concerned solely with property rights. The United States is not required to compensate persons who do not possess enforceable rights but might possibly or probably be permitted to occupy or use property.⁶ As Mr. Justice Holmes pointed out in *Emery v. Boston Terminal Co.*, 178 Mass. 172, 185, where compensation was claimed on the basis of a custom over a period of 35 years to renew a lease whenever it expired: "Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right." In fact, tenants from month to month have been said not to have such an interest in

⁶ The proper measure of compensation is of course a question of law which cannot be submitted to the jury, as was done by the trial court in this case (R. 159-160, 570, 576).

property condemned as to be entitled to any compensation. "The claim of a tenant in a condemnation proceeding is for the market value of the unexpired term of the lease. A month to month tenant * * * would have no such unexpired term and therefore would not be entitled to any award." *United States v. Certain Lands, Etc.*, 39 F. Supp. 91, 99 (E. D. N. Y.); cf. *Hanna v. County of Hampden*, 250 Mass. 107; *Tate v. State Highway Com'n*, 226 Mo. App. 1216; *Ijons v. Philadelphia & Reading Ry. Co.*, 209 Pa. 550. We feel that, in view of their right to 15 days' notice, the month-to-month tenants would at best be entitled to compensation for whatever portion of the 15 days remained after the period between November 11, 1942, and their dispossession.⁷

3. The questions presented are of large importance to the Government in its acquisition and use of property for war purposes. Frequently space is needed for office purposes or for housing military personnel during the war which will not be required for permanent use. Accordingly, the temporary use of a large number of buildings, such as apartment houses and office buildings, has been taken.⁸ Very often such buildings are oc-

⁷ The Government was granted immediate possession on November 11, 1942, and the tenants were ordered to vacate on certain dates between November 17 and December 1, 1942 (see Statement, *supra*, p. 3).

⁸ See S. Rep. No. 10, part 16, 78th Cong., 2d sess., p. 121. This is done pursuant to the policy expressed by Congress

cupied by tenants at will, tenants from month to month or tenants for other short periods less than the time for which the buildings are condemned. The result of the rulings of the courts below in this case is that when the United States condemned the only available space which would meet its requirements "and at the same time disturb the fewest possible tenants" (R. 373-374), it was required to pay a total of \$10,000 to six tenants in addition to paying the owner the full rental value of the building. Application of the view of the court below would produce similar results in numerous other cases.

CONCLUSION

For the foregoing reasons, the petition for writs of certiorari should be granted.

Respectfully submitted.

HUGH B. COX,
Acting Solicitor General.

MAY 1945.

in the Military Appropriations Act of 1945, Pub. No. 374, 78th Cong., 2d sess. (June 28, 1944) that property should be purchased "only when it would be more economical to purchase than lease, if leasing be possible, in cases where doubt prevails as to the land desired being permanently needed for military purposes."

OCT 15 1945

Nos. 77-83

EARL S. BLOOMER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

PETTY MOTOR COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

MERRILL J. BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL
COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. GRIMSDALL, DOING BUSINESS AS GROCER PRINTING
COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES E. WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE SHAFT
COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

INDEPENDENT PNEUMATIC TOOL COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

THE GALIGHIER COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

GRAY-CANNON LUMBER COMPANY

WRITS OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES



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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 77

UNITED STATES OF AMERICA, PETITIONER

v.

PETTY MOTOR COMPANY¹

ON WRITS OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE
TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 621-624) is reported in 147 F. 2d 912. The district court did not write an opinion.

¹ Together with No. 78, *United States of America, Petitioner v. Merrill J. Brockbank, Doing Business as Brockbank Apparel Company*; No. 79, *United States of America, Petitioner v. William G. Grimsdell, Doing Business as Grocer Printing Company*; No. 80, *United States of America, Petitioner v. Charles F. Wiggs, Doing Business as Chicago Flexible Shaft Company*; No. 81, *United States of America, Petitioner v. Independent Pneumatic Tool Company*; No. 82, *United States of America, Petitioner v. The Galigher Company*; and No. 83, *United States of America, Petitioner v. Gray-Cannon Lumber Company*.

JURISDICTION

The judgments of the circuit court of appeals were entered on March 5, 1945 (R. 625-626). The petition for writs of certiorari was filed on May 15, 1945, and was granted on June 18, 1945 (R. i, 628-670). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether tenants occupying property condemned by the United States for temporary use for a period longer than the tenants' existing leases are entitled to prove moving costs and consequential damages resulting from the enforced removal as evidence of the value of their interests.

2. Whether month-to-month tenants are entitled, upon condemnation of the leased property by the United States, to compensation based upon such indefinite period of time as the jury should conclude the tenants might have continued to occupy the property.

STATUTE INVOLVED

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201, 50 U. S. C. App. Supp. IV, sec. 632, is set forth in the Appendix, *infra*, p. 42.

STATEMENT

On November 9, 1942, the United States instituted proceedings, under the authority of the Second War Powers Act of March 27, 1942, Appendix, *infra*, p. 42, to condemn, for temporary use by the

Army, a building in Salt Lake City, Utah, known as the Old Terminal Building. The estate sought was a leasehold interest expiring June 30, 1945, with the right of election on the part of the United States to surrender possession on June 30, 1943, or on June 30, 1944, upon giving sixty days' notice. (R. 3-5.)

The building, owned by W. B. Richards, Jr., who had purchased it in October 1942 (R. 179, 211), was partly vacant (R. 353), the remainder being occupied by various tenants. The owner and tenants were made parties to the proceedings (R. 3-5). On November 11, 1942, all parties having appeared by counsel or in person pursuant to an order to show cause, the trial court granted the Government exclusive possession and, by consent, fixed a series of dates between November 17 and December 1, 1942, for each of the tenants to vacate (R. 5-8, 153). The owner and seven of the ten tenants (R. 7) participated in subsequent proceedings (R. 9-52, 89, 149). Five of the tenants—the Galigher Company (R. 245), Grocer Printing Company (R. 158), Chicago Flexible Shaft Company (R. 218), Brockbank Apparel Company (R. 382) and Gray-Cannon Lumber Company (R. 323)—had no written leases but were in possession on a month-to-month basis (R. 621-622). The Independent Pneumatic Tool Company had a written lease which provided that the term and all rights under the lease would terminate if possession of the premises was taken by a federal, state, or other

public authority for public use (R. 201-202; 622).² The Petty Motor Company had a written lease of the basement of the building for a term of one year beginning October 31, 1942, with the right to renew for another year (R. 433-436).

The tenants' claims for compensation were based principally upon expenditures incurred in moving out of the Old Terminal Building, renovating and remodeling the premises to which they moved and re-installing equipment at the new premises, and the increased rents required of them at their new premises (*e. g.*, R. 9-52, 184-186, 198, 230, 268-269, 329-332, 394-395, 459). The chief issues in the district court related to the admissibility of evidence of such items (*e. g.*, R. 154-155, 158-159, 167, 172, 195, 223, 287, 328, 391-392, 393-394, 447) and whether, in any event, tenants from month-to-month were entitled to compensation (*e. g.*, R. 158-159).

In answers by some of the tenants, these claims as to compensation were set forth (R. 9-11, 13-16, 17-32, 38-52). The Government attacked the tenants' claims by moving for summary judgment as to the tenants who had no written leases and by moving to strike allegations relating to items which the Government claimed were not compensable (R. 16, 17, 32-37, 152-153). The legal issues thus raised were argued and decided at a pre-trial conference

² This company had a lease expiring November 30, 1942, but a new lease for five years, commencing December 1, 1942, had been executed on August 10, 1942 (R. 201-202). The same "condemnation clause" was contained in both leases (R. 201-202).

had on March 12 and 15, 1942 (R. 89-148). The Government contended that the only issue between the United States and the various defendants, including the owner and the tenants, was the fair rental value of the entire building for the period taken and that the apportionment and distribution of the sum thus determined was a matter to be worked out between the landlord and the tenants (R. 116, 118-119). The United States relied upon *Carlock v. United States*, 53 F. 2d 926, 927 (App. D. C.) which holds that when various persons have separate interests or estates in the property taken, just compensation is determined as if the property were in a single ownership without reference to conflicting claims, and then apportioned among the parties according to their respective interests. The district court ruled that there were two separate issues: that between the United States and the owner the issue was the reasonable rental value of the premises taken and that between the United States and the tenants the issue was "the compensation, if any, which they may be entitled to recover by reason of having to relinquish occupancy of said premises" (R. 38; see also R. 136-141).

On the issue of the measure of compensation payable to the tenants, the court ruled that loss of profits could not be considered and that, although the various expenditures claimed by the tenants to have been incurred in moving, renovating and remodeling their new premises, etc., could not be recovered as

separate items of damage, evidence of such expenditures was admissible to show the value of the tenants' "rights of occupancy" (R. 141-148). Accordingly, the allegations of the answers as to loss of profits were stricken, as were the allegations claiming other expenditures as separate items, but permission was given to amend the answers to set out the latter items as showing the value of the rights of occupancy (R. 142-148). The Government's motions for summary judgment as to tenants who had no written leases were denied (R. 141-142, 152-153).

At the trial before a jury, all of the tenants introduced evidence of the expenditures incurred in moving out of the Old Terminal Building, renovating and remodeling the premises to which they moved, re-installing equipment at the new premises and the increased rents they were required to pay at their new premises (*e. g.*, R. 184-186, 198, 230, 268-269, 329-332, 394-395, 459). In addition, F. Orin Woodbury, a real estate agent, testified on behalf of the Grocer Printing Company, the Chicago Flexible Shaft Company, the Galigher Company, and the Independent Pneumatic Tool Company (R. 291-294). Although admitting on cross-examination that a month-to-month tenancy could not be sold in the market (R. 312), this witness expressed the opinion that the "value" of the occupancies of the first three companies named was, respectively, \$12,500, \$4,500, and \$7,500 (R. 293-294). In arriving at this opinion of value, he considered the difference between the rents formerly paid at the Old Terminal Building

and those paid at the premises to which the tenants moved, the cost of moving and reinstalling equipment, the cost of renovating or remodeling the new premises, the comparison between the Old Terminal Building and the new premises, the length of time the tenant had occupied the Old Terminal Building, the locality, and the business carried on (R. 293-294, 314). Basing his opinion upon similar considerations, Woodbury valued the interest of Independent Pneumatic Tool Company at \$3,500 (R. 293). Besides evidence of the various expenditures, witnesses on behalf of Gray-Cannon Lumber Company and the Petty Motor Company gave their opinions of the rental value of the respective premises (R. 335, 455, 471). Two witnesses for the Government testified that the reasonable rental value of each of the tenant's premises was no more than the rent that each of the tenants was paying at the time of the taking (R. 481-486, 517-518, 539).

During the trial, the court told the jury that whether the tenants had term leases or occupied the premises from month-to-month, the measure of their damages would be for the jury to determine; that while the primary question was the loss which each tenant sustained, it would be for the jury to decide whether the measure of damages for the loss should or should not be based upon the cost of moving, the increase in rent, and similar matters (R. 159-161). The Government's blanket objection, made at the beginning of the trial, to all evidence on behalf of the month-to-month tenants and to all evidence of

expenditures resulting from the removal was consequently overruled, as were similar objections made during the trial (R. 154-155, 167, 172, 195, 223, 287, 323-324, 325, 391-392, 393-394, 444, 447). At the close of the testimony, the United States moved for a directed verdict as to all of the tenants except the Petty Motor Company, the only one conceded to have a compensable interest in the building (R. 566). The trial court denied the motion (R. 566) and instructed the jury to the effect that the tenants' "rights of occupation" had been taken; that such rights, whether under a lease or a month-to-month tenancy, were property rights for which compensation must be paid; and that the measure of just compensation was for the jury to determine considering all the evidence, such as the length of time the building had been occupied by the tenant, the cost of moving, the cost of remodeling and renovating their new premises, the increased rent, whether they were better or worse off in their new premises than in the Old Terminal Building, etc. (R. 569-574). The Government's objections to the charge were overruled (R. 575-576). Separate verdicts were returned for each tenant and judgments were entered thereon totaling \$10,360 (R. 53-66).

No judgment was entered in favor of the owner of the building nor was any evidence introduced as to the rental value of the building as a whole. This was due to the fact that, pending the condemnation proceeding, the War Department had completed settlement negotiations for a lease of the entire

building from the owner (R. 317-318). When this fact appeared at the trial the United States moved that the proceedings be dismissed (R. 318-320). The motion was overruled (R. 320), but later the owner moved that the proceedings be dismissed as to him (R. 568). The United States joined in the motion, again asking that the proceedings be dismissed as to all the defendants (R. 568). The motion was granted as to the owner, but denied as to the other defendants (R. 568-569).³

Appeals taken by the United States from the judgments in favor of the tenants were briefed and, on March 21, 1944 (R. 620), submitted upon oral argument to the circuit court of appeals. No action was taken pending a decision by this Court in *United States v. General Motors Corp.*, 323 U. S. 373. After the *General Motors* case was decided, supplemental memoranda were filed and, on March 5, 1945, the circuit court of appeals affirmed the judgments of the district court (R. 624). In so doing the court below relied entirely on this Court's decision in the *General Motors* case, which was construed as holding that whenever less than fee simple title is condemned the established rules denying recovery of "consequential damages" do not apply (R. 624).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that the tenants in this case were entitled to prove moving costs and consequential

³ Although the owner was ordered dismissed from the proceedings, no formal judgment has been entered thereon.

damages resulting from the moving as evidence of the value of their interests.

2. In holding that the established rule denying consideration of consequential damages in determining just compensation is inapplicable whenever less than a fee simple title is taken.

3. In holding that a tenant whose lease provided for its termination upon the taking of all or any part of the demised premises by federal or other public authority is entitled to compensation.

4. In holding that month-to-month tenants are entitled to compensation based upon such indefinite period of time as the jury should conclude the tenants might have continued to occupy the property.

5. In affirming the district court's action in overruling the Government's objections to evidence of moving costs and other consequential damages.

6. In affirming the district court's action in overruling the Government's objections to any evidence on behalf of the month-to-month tenants.

7. In affirming the judgments of district court.

SUMMARY OF ARGUMENT

I

A. In this proceeding the United States condemned a leasehold interest in the Old Terminal Building for a temporary period expiring June 30, 1945, with the right to surrender possession on June 30, 1943 or June 30, 1944, upon giving sixty days' notice (R. 3-5). The court below conceded that the period thus taken extended beyond the

terms of the leasehold interests of the tenants occupying the building, with two possible exceptions (R. 624). Nevertheless, it held that under the decision of this Court in *United States v. General Motors Co.*, 323 U. S. 373, the district court was correct in admitting in evidence the costs incurred by all of the tenants in moving, the cost of renovating and remodeling the premises to which they moved, the cost of reinstalling equipment and increased rents they were required to pay at their new premises (R. 624). But in the *General Motors* case, this Court made it clear that whenever the United States condemns not only a fee but any other interest in property which is broad enough in scope to include a tenant's entire leasehold, thus terminating altogether his interest, the cost of moving removable fixtures and personal property from the premises and other like consequential losses cannot be considered in determining just compensation for the interest taken, 323 U. S. at 382. The holding of the court below is therefore contrary to the *General Motors* decision rather than being supported by it.

B. The court below further held that whenever less than a fee simple title is condemned, the established rule denying recovery of "consequential damages" does not apply. In so ruling, it affirmed the district court's admission, not only of evidence of the actual cost of moving the tenant's property, but also of evidence concerning the tenant's unwillingness to move, the increased rent paid for other premises and the cost of remodeling and renovating the new prem-

ises to suit the particular tenant's needs, etc. However, in the *General Motors* decision, this Court held that even under the circumstances of that case, where only part of the tenant's leasehold term was taken, leaving him with the necessity of moving back after the expiration of the term taken or holding the remainder of his leasehold which might be altogether useless to him, consequential losses such as value peculiar to the tenant, value of good will or injury to his business could not be considered.

An owner's unwillingness to move and what it may cost him to find another location and make it suitable for his business may measure a value or business loss peculiar to him. But these considerations do not affect the amount which a willing buyer would pay for the property and cannot be considered in determining just compensation whether the interest taken is a fee simple title or a leasehold.

C. The statement of the court below that the term of the lease held by the Independent Pneumatic Tool Company extended beyond that of the interest condemned is erroneous. The Independent Pneumatic Tool Company lease provided that if the whole or any part of the demised premises were taken by federal, state or other public authority, the lease would terminate when possession was taken and the tenant would not be entitled to any part of an award made for the taking or to any damages therefor. A tenant whose lease contains such a clause is entitled to no compensation when the premises are condemned, for his interest in the property expires automatically

when condemnation occurs. If a settlement had not been made with the owner in this case, and the value of the entire interest taken had been determined and then deposited in court for apportionment and distribution among the landlord, the tenants, and any other claimants of an interest in the property, Independent Pneumatic would not have been entitled to share in the award. The fact that a settlement, in the form of a lease, was made with one of the claimants, the landlord, does not enlarge the tenant's rights.

The Petty Motor Company lease, which was characterized by the court as being a "possible" exception to those which terminated prior to the expiration of the use taken by the United States, was for a one-year term expiring October 31, 1943, with the right to renew for another year (R. 433-436). The leasehold interest condemned, which was to run until June 30, 1945, unless possession was surrendered upon due notice on June 30, 1943, or 1944, was a term for some thirty-one months subject to a contingent limitation. Thus, the term taken was longer than that of the Petty Motor Company lease.

II

Five of the tenants in this case had no written leases and were, as has been stated, occupying the premises on a month-to-month basis. Although recognizing that these tenancies could have been terminated at any time by the owner upon fifteen days' notice, the courts below did not limit the com-

pensation to the value, if any, of the actual terms. Instead, the month-to-month tenants were permitted to recover on the basis of whatever indefinite period of time the jury might conclude they might have continued to occupy the property if the United States had not condemned it (R. 140-141; 570-571; 574; 622).

The Fifth Amendment requires compensation only for property rights. Tenants occupying property condemned are entitled to recover compensation based upon the value of the terms they actually have and not upon the length of time they might have remained in possession of the property if it had not been condemned. Since a month-to-month tenant has no unexpired term it has been held that such a tenant is not entitled to any compensation. *United States v. Certain Lands, Etc.* 39 F. Supp. 91, 99 (E. D. N. Y.); cf. *Hanna v. County of Hampden*, 250 Mass. 107; *Tate v. State Highway Com'n.*, 226 Mo. App. 1216; *Lyons v. Philadelphia & Reading Ry. Co.*, 209 Pa. 550.

Furthermore, as the district court said, if the United States had first acquired only the lessor's interest in the property and given the tenants fifteen days' notice to vacate, it could have secured possession without liability to the tenants (R. 571). Certainly, the Government's liability under the Fifth Amendment should not depend upon formal variations in the method utilized to accomplish the same result. At most, the tenants were only entitled to compensation for the value of their occupancy, if

any, for the few days' difference between the notice they received and the fifteen days' notice to which they were entitled.

ARGUMENT

I

THE TENANTS IN THIS CASE WERE NOT ENTITLED TO PROVE EXPENSES INCURRED AS A RESULT OF BEING REQUIRED TO MOVE OUT OF PREMISES CONDEMNED BY THE GOVERNMENT AS EVIDENCE OF THE VALUE OF THEIR TENANCIES

A. *The expense incurred by a tenant in moving removable fixtures and personal property from premises condemned is not to be considered in determining just compensation when the tenant's entire interest in the property is taken.* The United States condemned the Old Terminal Building for a period expiring June 30, 1945, with the right to surrender possession on June 30, 1943, or June 30, 1944, upon given sixty days' notice (R. 3-5). Throughout the case, the Government objected to the consideration of moving expenses for any purpose. (See *supra*, pp. 4-8.) And although the court below conceded that "the lease acquired by the government was for a term extending beyond the expiration of the lease owned by each of the tenants, with the exception of the lease owned by the Independent Pneumatic Tool Company, and possibly with the exception of the lease owned by the Petty Motor Company" (R. 624), it held that the principles announced in *United States v. General Motors Corp.*, 323 U. S. 373, are controlling whenever the United States condemns less than the fee simple

title and, consequently, that the district court was correct in allowing the jury to consider the costs incurred by all of the tenants in moving, the cost of renovating and remodeling the premises to which they moved, the cost of reinstalling equipment, and the increased rents they were required to pay at their new premises (R. 624).

In the *General Motors* case, the problem was to determine the proper measure of compensation when the temporary occupancy of a building is taken from a tenant holding under a long term lease who is obligated to continue paying rent under the terms of his lease during the Government's occupancy and who, presumably, would return to the building upon the termination of the Government's use. 323 U. S. 373, 380. The decision in that case not only reaffirmed the rule that the expense of moving removable fixtures and personal property from the premises and other like consequential losses cannot be considered when the United States condemns the fee, but it also made it clear that "when it [the Government] takes the property, that is, the fee, the lease, whatever he [the citizen] may own, *terminating altogether his interest*, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases." [Italics supplied] 323 U. S. at pp. 379-380, 382. It is only "when the Government does not take his entire interest, but by the

form of its proceeding chops it into bits * * * and leaves him holding the remainder" that the cost of moving out is to be considered in determining "what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier" (323 U. S. at p. 382).

As will be shown, the entire interests of the tenants in this case have been taken. They will have no terms remaining after the temporary occupancy condemned by the Government expires. They have no obligation to continue to pay rent while the Government is in possession nor will they be obliged to return to the premises upon termination of the Government's use. They are in the same position they would have occupied had the Government taken the fee. Consequently, the decision of the court below, rather than being supported by this Court's decision in the *General Motors* case, is contrary to it.⁴

B. Even a tenant whose entire interest is not taken when the Government condemns property for a temporary term cannot have consequential damages other than moving expenses resulting from the taking considered for any purpose.—The court below held that whenever less than fee simple title is condemned the established rule denying recovery of "consequential damages" does not apply. It apparently believed the *General Motors* decision limited cases such as

⁴ See *United States v. 10,620 Square Feet, Etc. in Canadian Pacific Building*, decided August 28, 1945 (S. D. N. Y.). Copies of this opinion have been lodged with the Clerk of this Court.

Mitchell v. United States, 267 U. S. 341,⁵ to instances where fee title is taken (see R. 324). On the contrary, in the *General Motors* case, this Court held that even when, as there, a temporary period for less than the term of an existing lease was taken "proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent * * * must be excluded from the reckoning" (323 U. S. at p. 383). Many of the items which the lessees were permitted to introduce in evidence, despite the Government's objections, represented consequential damages other than expenses of moving their property out of the premises.

For example, the jury was permitted to consider the increased rents which the tenants paid for their new premises. These rentals were introduced, not to show what comparable property was renting for at the time of taking, but simply as one of a group of items which, in total, the tenants characterized as the loss they suffered (see R. 184-186, 198, 230, 268, 394, 459). Thus some of the tenants testified to the amount of their increased rents for the duration of the leases which they claimed they had to execute to obtain their new premises (from one to five years) (R. 186, 195, 230, 269) and one tenant who executed

⁵ See also *United States, ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 281-282; *Joslin Co. v. Providence*, 262 U. S. 668, 676; *Omnia Co. v. United States*, 261 U. S. 502, 510-511; *Bothwell v. United States*, 254 U. S. 231.

a one-year lease for his new location claimed increased rent for 31 months (the duration of the term taken by the United States) (R. 393, 395-396).

The fact that the new premises cost more than the old may increase the tenant's overhead expenses and therefore reduce his net profits, but this is a business loss. In return for the rent he will pay, he will receive the use of the new location. The question to be determined is the market rental value of the property taken—not what it may cost to rent another particular piece of property or what it would cost to adapt it to the peculiar requirements of the tenant's business. The question was not, as the trial court instructed the jury, whether the tenants were better or worse off in their new quarters (R. 572-573). As this Court pointed out in *United States v. Miller*, 317 U. S. 369, 373-374, "It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value." "The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes." *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 81. In *United States v. General Motors*, 323 U. S. 373, 382, this Court again adhered

to the concept of market value.⁶ While holding that certain items theretofore inadmissible as being speculative and consequential in nature and having no bearing on market value⁷ are still inadmissible where fee

⁶ The court below apparently thought that the *General Motors* decision had departed from the market value standard since it cited *United States v. Miller*, 317 U. S. 369, as one of the "long line of decisions" relied upon by the Government which were held to be inapplicable where less than fee title is condemned (R. 624).

⁷ *Joslin Co. v. Providence*, 262 U. S. 668, 676; *Potomac Electric Power Co. v. United States*, 85 F. 2d 243, 249 (App. D. C.), certiorari denied, 259 U. S. 565; *Futrowsky v. United States*, 66 F. 2d 215, 216-217 (App. D. C.); *Gershon Bros. Co. v. United States*, 284 Fed. 849 (C. C. A. 5); *Pacific Live Stock Co. v. Warm Springs Irr. Dist.*, 270 Fed. 555, 559 (C. C. A. 9); *Wm. Wrigley, Jr., Co. v. United States*, 75 C. Cls. 569, 583-585; *Howard Co. v. United States*, 81 C. Cls. 646, 654; *Thermal Syndicate, Ltd. v. United States*, 81 C. Cls. 446, 454; *Chrystal v. United States*, 81 C. Cls. 461, 468; *United States v. Building Known as 651 Brannan Street*, 55 F. Supp. 667 (N. D. Cal.); *United States v. Certain Parcels of Land, Etc.*, 54 F. Supp. 561 (S. D. Cal.); *United States v. 0.64 Acres of Land in Los Angeles County*, 54 F. Supp. 562 (S. D. Cal.); *United States v. Improved Premises, Etc.*, 54 F. Supp. 469-472 (S. D. N. Y.); *United States v. Entire Fifth Floor in Butterick Building*, 54 F. Supp. 258; 261 (S. D. N. Y.); *United States v. Meyers*, 190 Fed. 688 (D. Conn.); *Central Pac. R. R. Co. v. Pearson*, 35 Cal. 247, 263 (1868); *County of Los Angeles v. Signal R. Co.*, 86 Cal. App. 704, 710-712 (1927); *Mayor & C. C. of Balt. v. Gamse*, 132 Md. 290, 296-297 (1918); *New York, Etc. Railroad v. Blacker*, 178 Mass. 386, 391-393 (1901); *In re Assessment for Widening Third St., St. Paul*, 176 Minn. 389, 392 (1929); *St. Louis v. St. Louis, I. M. & S. Ry.*, 266 Mo. 694, 707 (1916); *Springfield S. W. Ry. Co. v. Schweitzer*, 173 Mo. App. 650, 655 (1913); *Ranlet v. Railroad*, 62 N. H. 561, 564 (1883); *Matter of New York, W. S. & B. R. Co.*, 35 Hun 633 (1885).

title is condemned, this Court concluded that under the peculiar circumstances of that case, where the temporary use of a building occupied under a long term lease was taken, such items would affect the market rental value, i. e., "the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction." 323 U. S. 373, 383. But, even under those circumstances, this Court held that, "Proof of such costs as affecting market value is to be distinguished from proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent which, in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning." *Ibid.* If the measure of compensation is the market rental value of the property taken, the inability of the tenant to obtain another location which would, to his satisfaction, meet the requirements of his particular business, without paying a higher price for it or without remodeling or making alterations to fit his needs cannot be considered. While such matters "will doubtless affect the price at which [the owner] would have been willing to sell his property, [they] will not affect the price at which he *could* have sold it." Orgel, *Valuation Under Eminent Domain* (1936) sec. 70, p. 236. To the extent that the tenant's inability to find suitable quarters is typical of a general difficulty, market value will reflect such embarrassment.

Furthermore, "it is usually said that market value is what a *willing buyer* would pay in cash to a *willing*

seller." [Italics supplied.] *United States v. Miller*, 317 U. S. 369, 374; see also *Olson v. United States*, 292 U. S. 246, 257. The fact that a tenant "did not want to move, wanted to stay there, would have paid a very large sum to stay there, is not a test of market value, because it is not a case of one who wants to sell and one who wants to buy. If [he] had wanted to go out, the question is, what would his lease have brought? Not what it would have been worth to him if he had wanted to stay there, because it may have been of greater value or of less value to him than its value upon the market." *Lawrence v. Boston*, 119 Mass. 126, 128-129; cf. R. 174-175, 228, 259; see also *Kishlar v. Southern Pac. R. Co.*, 134 Cal. 636; cf. *United States v. Honolulu Plantation Co.*, 122 Fed. 581, 584-585; *United States v. Miller*, 317 U. S. 369, 375; *United States v. General Motors Corp.*, 323 U. S. 373, 383. Unless the *willing buyer* is to be eliminated entirely from consideration and compensation determined solely on the basis of what an *unwilling seller* would demand for his property, the decision of the court below cannot stand.⁸ The fact that the trial court disregarded the standard of a willing seller and substituted for it a personal standard of value is

⁸ Besides the increased rental at the new premises many other items of consequential damage were considered at the trial. For example, the tenants were permitted to introduce evidence of the cost of renovating a sign used by a tenant at the old premises which "was kind of worn out, been up for a long time" (R. 177), the cost of photographs of a tenant's new location to send to the main office of the company (R. 200-201), and the cost of changing advertising cuts (R. 256).

evident from its rulings permitting condemnees to testify to their unwillingness to move (R. 174-175; 228, 259), *i. e.*, their reluctance to have their property condemned, as well as its rulings admitting evidence of moving expenses and other consequential damages to show "the loss to these tenants for being deprived of the use and occupation" of the premises (R. 160).

C. *The entire interests of the tenants were taken.*—As has been said, the court below conceded that the entire term of most of the tenants had been taken, but it held that the Independent Pneumatic Tool Company lease and "possibly" the Petty Motor Company lease were for terms longer than the temporary use taken by the Government (R. 624). Independent Pneumatic had a lease which expired November 30, 1942, but on August 10, 1942, it had obtained a new lease for five years commencing December 1, 1942 (R. 201-202). Both of these leases provided that (R. 202):

If the whole or any part of the demised premises shall be taken by Federal, State, county, city, or other authority for public use, or under any statute, or by right of eminent domain, then when possession shall be taken thereunder of said premises, or any part thereof, the term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease.

That Independent Pneumatic's interest was thus not carved up, leaving a part of its leasehold after Government occupancy ended, is made clear by the fact that a tenant whose lease provides for its termination upon a sale of the property by the owner or upon the taking of the leased premises for a public use, is entitled to no compensation when it is condemned.⁹ Although the court below referred (R. 622) to this clause in the lease of Independent Pneu-

⁹ *United States v. 10,620 Square Feet, Etc., in the Canadian Pacific Building, supra*; *United States v. 45,000 Square Feet, Etc., at 605-615 W. 42nd Street*, decided August 28, 1945 (S. D. N. Y.) (copies of which are lodged with the Clerk of this Court); *United States v. 8,286 Sq. Ft. of Space in Paca-Pratt Building, Etc.*, 61 F. Supp. 737. (D. Md.); *United States v. 21,815 Square Feet of Land, Etc.*, 59 F. Supp. 219 (E. D. N. Y.); *United States v. Improved Premises*, 54 F. Supp. 469 (S. D. N. Y.); *United States v. Certain Parcels of Land in Loyalsock Township, Etc.*, 51 F. Supp. 811, 812 (M. D. Pa.); *United States v. Inlots*, 26 Fed. Cas. No. 15441a, at page 492 (C. C. S. D. Ohio); *Burbridge v. New Albany and Salem R. Co.*, 9 Ind. 546; *Goodyear & Co. v. Boston Terminal Co.*, 176 Mass. 115; *In re Improvement of Third Street*, 178 Minn. 522; *Matter of Mayor of New York*, 168 N. Y. 254; *In re Water Front in Tompkinsville, Etc.*, 219 N. Y. App. Div. 387; *Scholl's Appeal*, 292 Pa. 262; see *In re Water Front*, 246 N. Y. 1, 31-34, certiorari denied, 276 U. S. 626; cf. *Zeckendorf v. Cott*, 259 Mich. 561; *United States v. 3.5 Acres of Land in South Boston, Mass.*, 57 F. Supp. 548 (D. Mass.); *American Creameries Co. v. Armour & Co.*, 149 Wash. 690; *Boston v. Talbot*, 206 Mass. 82. The decision in *United States v. 150.29 Acres of Land, Etc.*, 148 F. 2d 33 (C. C. A. 7), certiorari denied, June 18, 1944, *sub nom. Eline's Inc. v. Gaylord Container Corp., et al.*, October Term 1944, Nos. 1302-1303, supports this view, for it assumes that if the "condemnation clause", as properly construed, embraced condemnation by the Federal Government, the tenant could not share in the award.

matic Tool Company, it did not give any reason or cite any authority to support the view that, despite this clause, the tenant's interest was not terminated by condemnation. Nothing in the *General Motors* case warrants such repudiation of a lease clause as to permit a tenant whose interest has terminated to secure compensation. *United States v. 21,815 Square Feet of Land in Borough of Brooklyn*, 59 F. Supp. 219 (E. D. N. Y.); *United States v. 8,286 Sq. Ft. of Space in Paca-Pratt Building, Etc.*, decided July 25, 1945 (D. Md.).¹⁰

Respondent attempts to support the ruling of the court below with the assertion that this clause was merely for the benefit of the lessor and not the Government (Br. in Opp. pp. 11-12). But, as the court stated in *United States v. 8,286 Sq. Ft. of Space in the Paca-Pratt Building, Etc.*, *supra*, with reference to a similar contention:

This contention is not new. It was advanced and rejected in some of the older cases. The short answer given is that as the lease expires by its own provision when condemnation occurs, the lessee has no property interest taken by the Government, and therefore has no provable damage. *In re Imp. Third St.*, 178 Minn. 552; *Munigle v. City of Boston*, 3 Allen (Mass.) 230; *Scholl's Appeal*, 292 Pa. 262.

Nor does the fact that a settlement was made with the landlord change the result (cf. Br. in Opp. p. 12).

¹⁰ 61 F. Supp. 737.

A condemnation proceeding, whether to take the fee or temporary use, is *in rem* against the property itself. *Duckett & Co. v. United States*, 266 U. S. 149, 151. Consequently the amount which the condemnor must pay cannot be increased by contracts or distribution of ownership of the property among different persons, and its liability is determined as if the property were in single ownership. That liability is discharged when the value of the interest taken is paid into court and, ordinarily, the division of ownership becomes important only in apportionment of the total award—a matter which does not concern the condemnor. *United States v. Dunnington*, 146 U. S. 338, 350–353; *United States v. Certain Lands in Hempstead, Nassau Cy., N. Y.*, 129 F. 2d 918, 919–920 (C. C. A. 2); *Silberman v. United States*, 131 F. 2d 715, 717 (C. C. A. 1); *Carlock v. United States*, 53 F. 2d 926, 927 (App. D. C.); *Meadows v. United States*, 144 F. 2d 751, 752–753 (C. C. A. 4); *Washington Water Power Co. v. United States*, 135 F. 2d 541 (C. C. A. 9), certiorari denied, 320 U. S. 747; *Mayor & C. C. of Balto. v. Gamse*, 132 Md. 290, 293; *Edmands v. Boston*, 108 Mass. 535, 544, 549; *State ex rel. Kafka v. District Court*, 128 Minn. 432, 436–437, 151 N. W. 144; *State v. Superior Court*, 80 Wash. 417, 420–421; *Detroit v. Fidelity Realty Co.*, 213 Mich. 448, 458–459.

Inasmuch as the United States settled with the owner, it does not deny that it is primarily liable to

the tenants.¹¹ However, the fact that a settlement in the form of a lease was made with one of the claimants, the landlord, does not change the nature of the proceeding. Contrary to respondent's assertions (Br. in Opp. pp. 3, 5, 12), the Government condemned, not merely the tenant's interests, but rather a "leasehold interest" in the building for the named period, including the interests of both the landlord and the tenants (R. 3-5).¹² Cf. *Duckett & Co. v.*

¹¹ The lease with the owner was not introduced in evidence. Since it did not mention the tenants (R. 567-568), no question is raised here as to whether the United States may be entitled to indemnity from the owner on the theory that the rental agreed upon was intended to cover any liability to the tenants. Cf. *United States v. Certain Parcels of Land in Loyalsock Township, Etc.*, 51 F. Supp. 811 (M. D. Pa.); *Lawrence v. Boston*, 119 Mass. 126.

¹² Throughout the proceedings below, the Government insisted that it was proceeding *in rem* against the property. Cf. R. 116, 118-119. Hence, it took exceptions when the court ordered dismissal as to the landlord but not as to the tenants (R. 568-569). Although a notice of appeal was filed as to the owner (R. 73-74) it was ineffective because no final judgment dismissing the owner was entered. *Wright v. Gibson*, 128 F. 2d 865 (C. C. A. 9); see *Western Electric Co. v. Patent Reproducer Corporation*, 37 F. 2d 14 (C. C. A. 2), certiorari denied, 282 U. S. 873, and cases there cited. Consequently, the Government preserved the question in the only way possible by including the objection in the specification of errors in the court below (R. 86). This matter is irrelevant here so far as it relates to the owner's claim, since that claim has been settled. However, the Government submits that such settlement does not enlarge the tenant's rights, and that if, for some reason, dismissal of the owner should be thought to enlarge the rights of other claimants, such dismissal should be ignored since no judgment was entered thereon.

United States, 266 U. S. 149, 151. In other words, as this Court held in the *Duckett* case, *supra*, the United States proceeded *in rem* against the property. Thus, if, rather than settling with the owner, the United States had paid into court the total value of the leasehold estate it condemned, Independent Pneumatic would not have been entitled to share in the award. It is submitted that the rights of Independent Pneumatic are no greater in the instant case and hence, that that Company is not entitled to any award. Cf. *United States v. 18,286 Sq. Ft. of Space in Paca-Pratt Building*, *supra*, *United States v. 10,620 Square Feet, Etc., in Canadian Pacific Building*, *supra*. And this being so, it is, of course, true that Independent Pneumatic's leasehold did not extend beyond the term taken by the Government. To hold otherwise would largely discourage, if not prohibit, the making of settlements with lessors.

The Petty Motor Company had a lease for one year expiring October 31, 1943, with the right to renew for another year (R. 433-436). The Government took the premises until June 30, 1945, but it could have surrendered possession on June 30, 1943, or 1944 (see R. 3-5). The circuit court of appeals stated that this lease was a possible exception to those which terminated prior to the expiration of the use taken by the United States (R. 624). However, because of the construction given to the *General Motors* decision, the court below did not pass upon this question. It is submitted that the taking by the United States of more than thirty-one months' occupancy (from November 11, 1942, through June 30, 1945) terminated altogether the Petty Company's

interest, even though the Government's occupancy might have been relinquished earlier.¹³ The Petty Company would, of course, be entitled to compensation for the remainder of its lease, which had almost a year (November 11, 1942–October 31, 1943) to run, with a right to renew for another year (to October 31, 1944).¹⁴

The interest condemned by the Government was a term for three years subject to a contingent limitation. 3 Thompson, *Real Property* (Perm. Ed.) Secs. 1178, 1017, pp. 243, 6. Indeed, Petty recognized this, for it claimed compensation for a taking of greater duration than a leasehold which would end either on June 30, 1943, or on June 30, 1944 (R. 424, 459). Thus, the term taken was longer than that of the Petty Motor Company, and Petty's position is, in this important respect, different from that of General Motors. Moreover, Petty was not bound to,¹⁵ and did not continue paying rent (R. 573).

¹³ Respondent has stated that the Army abandoned the Old Terminal Building less than a year after taking it (Br. in Opp. p. 11). The Pacific Division of the Army Engineers for whose use it was originally taken no longer occupies the building. However, the lease with the owner was renewed until June 30, 1945, and the building has been occupied by other branches of the War Department and other Government agencies after that date.

¹⁴ Petty's valuation evidence was based on the assumption that its right to renew had already been exercised and, therefore, that its lease continued for two years (R. 424, 459). Petty introduced no evidence as to the separate value of its right to renew, and no question is here raised as to the value, if any, of such right.

¹⁵ See Orgel, *Valuation under Eminent Domain* (1936) Sec. 119, pp. 405–406.

Rather than being chopped "into bits" (323 U. S. at 382), Petty's entire interest was taken.

To summarize, the entire interest of each of the tenants has been terminated. They are not under any liability either to pay rent or to return to the premises. At most, the date when they could have been compelled to move from the premises has been accelerated for a very short period. In fact, two of the defendants, Grocer Printing Company and Mutual Typesetting Company, received more than the fifteen days' notice to which they were entitled under Utah law (R. 7, Utah Code Ann. (1943) Secs. 104-60-3 (2)). See *infra*, p. 39.

Petitioner's reliance (Br. in Opp. p. 9) on *United States v. Chicago, B. & Q. R. Company*, 82 F. 2d 131 (C. C. A. 8), certiorari denied, 298 U. S. 689, is misplaced. Whatever the merits of that decision, and quite apart from the fact that that case involved the taking of a portion of a railroad easement, as to which an exceptional measure of compensation has long been accepted (cf. *United States v. Grizzard*, 219 U. S. 180), it is clear that the circuit court of appeal's suggestion in that case that cases like *Gibson v. United States*, 166 U. S. 269, have been overruled (82 F. 2d at 134-135), and that the words "or damaged" have now been added to the word "taken" in the Fifth Amendment (82 F. 2d at 139), cannot stand in the light of this Court's recent decisions. See, e. g., *United States v. Willow River Co.*, 324 U. S. 499, 502, 510. The opinion in the *General Motors*

case, in any event, itself supplies sufficient answer to petitioners' argument. It was there said (323 U. S. at 379-380):

The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign.

* * * Even where state constitutions command that compensation be made for property "taken or damaged" for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage.

It is submitted that, in these circumstances, this Court's decision in the *General Motors* case does not support the rulings of the courts below permitting the consideration of removal expenses and like consequential losses.

Frequently, space is needed by the Government for office purposes or for housing personnel which will not be required for permanent use. Accordingly, during the war emergency, the temporary use of a large number of buildings, such as apartment

houses and office buildings, has been taken.¹⁶ Very often such buildings are occupied by tenants at will, tenants from month-to-month or tenants for other short periods less than the time for which the buildings are condemned. The result of the rulings of the courts below in this case is that when the United States condemned the only available space which would meet its requirements "and at the same time disturb the fewest possible tenants" (R. 373-374), it was required to pay a total of \$10,000 to six tenants in addition to paying the owner the full rental value of the building.

In the short time that has elapsed since the *General Motors* decision, experience has already shown the lengths to which condemnees will go in their efforts to pass moving expenses and other consequential damages on to the Government. We have already adverted (*supra*, note 8, p. 22) to the items claimed to be relevant by petitioners here—like the cost of renovating a worn out sign used at a tenant's old premises; and, in other cases, such claims as tips to porters, the time of a vice-president and salesmen utilized in searching for new quarters, and meals for

¹⁶ See S. Rep. No. 10, part 16, 78th Cong., 2d sess., p. 121. This is done pursuant to the policy expressed by Congress in the Military Appropriations Act of 1945, Pub. No. 374, 78th Cong., 2d Sess. (June 28, 1944) that property should be purchased "only when it would be more economical to purchase than lease, if leasing be possible, in cases where doubt prevails as to the land desired being permanently needed for military purposes."

men during moving, have been introduced as relevant factors. See *United States v. 10,620 Square Feet, Etc. in Canadian Pacific Building, supra*; *United States v. 45,000 Square Feet, Etc. at 605-615 West 42nd Street, supra*. Unless this Court reaffirms the limitations made in the *General Motors* case itself on the situations in which such evidence may be properly admitted, it is to be feared that the view of the court below will lead counsel and other courts to go even further in their claims and allowances.

We do not contend that the guarantees of the Fifth Amendment are any less during war time (cf. Br. in Op. p. 11). But because the exigencies of war have made it necessary to acquire much property for public use during a short space of time, the inconveniences and dislocations of property owners resulting from this cause have naturally been greater. Nevertheless, it has been long established that when the fee title to property is condemned, no allowance may be made for the types of injuries claimed here. See *supra*, pp. 16, 20-23. Respondents, who were subject to being required to move some time and thus, when their interests terminated, incur the expenses claimed here, should be in no better position than the owners and long-term tenants in cases where the fee is taken.

Respondent makes the general contention that the verdicts were far less than they might have been, or than respondent thinks they should have been, and that the substantial rights of the Government have

thus not been affected (Br. in Op. pp. 6, 13). But "In an eminent-domain proceeding, the vital issue—and generally the only issue—is that of just compensation." *McCandless v. United States*, 298 U. S. 342, 348. Therefore any ruling as to the measure of damages or elements to be considered in determining compensation affects the substantial rights of the parties and "is ground for reversal unless it *affirmatively*¹⁷ appears from the whole record that it was not prejudicial." *McCandless v. United States*, 298 U. S. 342, 347-348; *United States v. River Rouge Co.*, 269 U. S. 411, 421. An examination of the record reveals that almost all of the evidence introduced by the tenants to show the value of their premises either consisted entirely of moving expenses and other consequential damages or was based largely upon a consideration of such items. Cf. *Atlantic Coast Line R. Co. v. United States*, 132 F.2d 959, 963 (C. C. A. 5). The trial court instructed the jury to consider this inadmissible evidence. Since the jury is presumed to have followed the instructions of the court and to have considered what was practically the only evidence before it, it is inconceivable that the admission of the evidence and the instructions of the court setting forth an erroneous measure of compensation did not affect the substantial rights of the Government.

¹⁷ Italics by the court.

MONTH-TO-MONTH TENANTS OF PROPERTY CON-
DEMNED BY THE GOVERNMENT ARE NOT EN-
TITLED TO COMPENSATION BASED UPON THE
LENGTH OF TIME THEY MIGHT HAVE REMAINED
IN POSSESSION OF THE PROPERTY

Although recognizing that month-to-month tenancies might be terminated at any time by the owner upon fifteen days' notice, the district court did not limit the compensation of those tenants to the value, if any, of their actual terms (see R. 140-141; 570-571). Instead, he instructed the jury that while a month-to-month tenancy was uncertain, it might "last a long time, as it had in many cases, for years and years and years" (R. 571) and submitted for determination by the jury "What length of time would that occupation fairly and reasonably cover, * * *" (R. 574).¹⁸ The circuit court of appeals,

¹⁸ This instruction thus permitted the jury to speculate as to whether the owner, who had purchased the building within a month of the condemnation proceeding, would continue the policies of his predecessors and would not attempt to raise the rents of the month-to-month tenants or notify them to vacate even though space was becoming scarce in Salt Lake City (R. 424-425). However, in the cases of the tenants claiming under written leases, such speculation was not allowed because the court, quite properly, limited their recovery to the unexpired terms of their leases (R. 572).

referring to the fact that the tenants had occupied their premises for many years, that the arrangement was mutually satisfactory to the tenants and the owner, and that the tenants had every reason to think they could remain indefinitely, characterized the claimants as "long-time tenants", and stated that "the record justifies the conclusion that each would have continued for an indefinite period had not the government begun condemnation proceedings" (R. 622).

These rulings, which respondents interpret as meaning that the month-to-month tenants "had a right so far as the Government is concerned to remain in the possession of their premises forever" (Br. in Opp. p. 8), disregard the fact that the just compensation provision of the Fifth Amendment is concerned solely with property rights. *United States v. General Motors Corp.*, 323 U. S. 373, 377-378; *Monongahela Navigat'n Co. v. United States*, 148 U. S. 312, 326. The United States is not required to compensate persons who do not possess enforceable rights but might possibly or probably be permitted to occupy or use the property.¹⁰ As Mr. Justice Holmes pointed out in *Emery v. Boston Terminal Co.*, 178 Mass. 172, 185, where compensation was claimed on the basis of a custom over a period of 35 years to renew a lease whenever it expired: "Changeable in-

¹⁰ The proper measure of compensation is, of course, a question of law which cannot be submitted to the jury, as was done by the trial court in this case (R. 159-160, 570, 576). Cf. *Chicago, Burlington & C. R'd v. Chicago*, 166 U. S. 226, 242.

tentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right." Cf. *Ranlet v. Railroad*, 62 N. H. 561. In fact, tenants from month-to-month have been said not to have such an interest in property condemned as to be entitled to any compensation. "The claim of a tenant in a condemnation proceeding is for the market value of the unexpired term of the lease. A month-to-month tenant * * * would have no such unexpired term and therefore would not be entitled to any award." *United States v. Certain Lands, Etc.*, 39 F. Supp. 91, 99 (E. D. N. Y.); cf. *Hanna v. County of Hampden*, 250 Mass. 107; *Tate v. State Highway Com'n*, 226 Mo. App. 1216; *Lyons v. Philadelphia & Reading Ry. Co.*, 209 Pa. 550.²⁰

²⁰ The last three cases cited hold that a tenant at will has no estate which entitles him to damages when the premises are taken under the power of eminent domain. In those cases the tenancies at will were, under the laws of the particular states, essentially the same as tenancies from month-to-month under Utah law in that the notice required to terminate them was longer than that required in Utah to terminate a month-to-month tenancy. Compare Utah Code Ann. (1943) sec. 104-60-3 (2) with 6 Mass. Laws Ann. (Michie) c. 186, sec. 12; Mo. Rev. Stat. Ann. sec. 2971; and Pa. Stat. Ann. (Purdon Perm. Ed.) Tit. 68, sec. 361.

Similarly, the rule that only persons having enforceable interests in the property are entitled to compensation prevails in Canada where, by statute, full compensation must be paid "to all persons interested, for all damage by them sustained" and in England even under statutes extending the right to compensation to "occupiers". *Canadian Pac. R. Co. v. Alex. Brown Milling, Etc. Co.*, 18 Ont. L. Rep. 85, 15 Am. & Eng. Ann. Cas. 709 (1909); *The King v. Liverpool & Manchester Rly. Co.*, 4 Ad. & El. 650, 111 Eng. Repr. 931 (1836); *Syers v. Metropolitan Board of Works*, 36 Law Times Rep. (Eng. 1877) 277. In the *Canadian Pacific* case, *supra*, the trial court held that tenants holding over after the expiration of a lease which had not been renewed as provided in the lease "had at least their possession to give up",²¹ and having this, they were entitled to have considered not only their legally enforceable rights but also the probability of future advantages including the probability of their being granted a new lease. 18 Ont. L. Rep. 91-92. This ruling was reversed, the appellate court holding that to be entitled to compensation a person must have "some definite interest in the land itself. The mere possession or occupation as tenant at will * * * is not * * * sufficient." 18 Ont. L. Rep. 85, 98. Not only is compensation limited to the legal interests in the property taken,

²¹ This seems to be practically the same as the trial court's theory that the tenants had a "right of occupancy" and that their compensation, if any, was for "having to relinquish occupancy" of the premises (R. 569-570, 38).

but in some instances, the owner of a technical interest in the property is denied recovery of substantial compensation. For example, the owner of a possibility of reverter has no compensable interest in the property. *People of Puerto Rico v. United States*, 132 F. 2d 220 (C. C. A. 1), certiorari denied, 319 U. S. 752, and authorities cited at 132 F. 2d 222.

Moreover, as the district court said (R. 571) the United States could have secured possession of the property without liability to the tenants by acquiring only the lessor's interest and then giving the required notice to vacate.²² See, e. g., *Goodyear &c. Co. v. Boston Terminal Co.*, 176 Mass. 115. Awards totaling \$9,400 were made to the month-to-month tenants, however, because the Government condemned a leasehold interest naming both the owner and the tenants as parties. Certainly, the compensation payable under the Fifth Amendment should not be affected by such formal variations in the manner in which the same result is reached.

It is submitted that the month-to-month tenants were entitled to no compensation for the taking of the Old Terminal Building. If, however, their right to fifteen days' notice is deemed sufficient to give them a compensable interest in the property, their compensation should be limited to the value of the interest they actually had. At best this would be the value of whatever portion of the fifteen days remained after the period between November 11, 1942

²² See *supra*, p. 30.

and their dispossession²³(R. 7). The value of that short period, if any, should be determined in the same way that the term of Petty Motor Company, which extended to October 31, 1943, is to be valued.²³ This term should be valued by determining the market rental value of the tenant's premises for the number of days involved and subtracting there from the rent payable to the landlord. *Silberman v. United States*, 131 F. 2d 715, 718 (C. C. A. 1); *Carlöck v. United States*, 53 F. 2d 926, 927-928 (App. D. C.); *Mayor & C. C. of Balto. v. Gamse*, 132 Md. 290, 295-298 (1918); *Fiorini v. Kenosha*, 208 Wis. 496, 501; see Orgel, *Valuation Under Eminent Domain* (1936) sec. 124.

Gray-Cannon Lumber Company introduced evidence as to the costs of improvements made to the premises taken, consisting of the expenditures made for a plate glass front, a ramp, an overhead door, and a built-in desk (R. 325-326). No separate allowance can be made for these items. They were all "an integral part of the building" and the landlord reimbursed the tenant for about half the cost (R. 326). Since the improvements became part of the realty, they were the property of the landlord and the tenant simply had a right to use them along with the rest of the property until the expiration of its lease in August 1941 (R. 323) and thereafter for the few days that it was entitled to remain in possession as a tenant from month-to-month. The

²³ See *supra*, note 14, p. 29.

tenant's rights in such improvements are, therefore, included when the rental value of the portion of the premises it occupied is determined. *United States v. 150.29 Acres of Land, Etc.*, 148 F. 2d 33, 37 (C. C. A. 7), certiorari denied, *sub nom. Eline's Inc. v. Gaylord Container Corp.*, Oct. Term 1944, Nos. 1302-3. Insofar as these improvements were removable fixtures or personal property and were removed by the tenant, no compensation is owing because the tenants were not, as we have shown, entitled to have the costs of removal considered.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the court below should be reversed.

✓ HAROLD JUDSON,
Acting Solicitor General.

✓ J. EDWARD WILLIAMS,
Acting Head, Lands Division.

✓ ARNOLD RAUM,
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OCTOBER 1945.

APPENDIX

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201, 50 U. S. C. App., Supp. IV, sec. 632, provides as follows:

SEC. 201. The Act of July 2, 1917 (40 Stat. 241), entitled "An Act to authorize condemnation proceedings of lands for military purposes," as amended, is hereby amended by adding at the end thereof the following section:

"SEC. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended."

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In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES OF AMERICA, PETITIONER

v.

PETTY MOTOR COMPANY; MERRILL J. BROCKBANK,
DOING BUSINESS AS BROCKBANK APPAREL COM-
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AS GROCER PRINTING COMPANY; CHARLES F.
WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE
SHAFT COMPANY; INDEPENDENT PNEUMATIC
TOOL COMPANY; THE GALIGHER COMPANY; AND
GRAY-CANNON LUMBER COMPANY,

RESPONDENTS.

**BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT.**

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The Acting Solicitor General has by letter dated May 12, 1945, sent a copy of page brief of a purported Petition for Writ of Certiorari to one attorney of this respondent, but no notice of filing, copy of the record, brief or petition, except as noted, has been served. In order, however, to avoid further delay and to expedite the ending of this case, William G. Grimsdall, doing business as Grocer Printing Company, opposes the issuance of a writ of certiorari to review the judgment entered in this case on March 5, 1945,

by the United States Circuit Court of Appeals for the Tenth Circuit. The cases of the other respondents are similar to his own.

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R.) is reported in 147 Fed. (2d) 912.

JURISDICTION

There is no impelling reason within the rules of this court, and particularly Rule 38, paragraph 5, for granting the writ of certiorari.

QUESTIONS PRESENTED

The United States has sustained no injury by the judgments in these cases. They are far less than they should have been.

STATEMENT

The statement of facts in the opinion of the Circuit Court of Appeals below is correct. The Government's statement in its petition is in some respects inadequate and misleading.

Two days after this case was instituted an order of possession was entered November 11, 1942 requiring the respondents to vacate their premises commencing November 17, 1942 to December 1, 1942 (R. 6-8). By this order the Government was given exclusive possession of respondents' premises.

Grocer Printing Company had been in possession of its premises for 26 years as a printing establishment (R. 155-156), 21 years of which were without any written lease

(R. 161). It had to remove machinery weighing approximately 60,000 pounds installed with special supports and equipment, and sign a five year lease for new quarters at greatly advanced rentals (R. 184).

Chicago Flexible Shaft Company had occupied its premises in the same building without a written lease under four different landlords for 26 years. Its premises were specially equipped (R. 217), and it had to pay increased rent, plus \$500.00 bonus for new quarters (R. 223).

The Galigher Company had been in its premises in the same building without a written lease for 18 years with premises specially fitted and constructed for its business (R. 245-249), and it also had heavy moving expenses and increased rent to pay because of the taking of its property (R. 268).

The other tenants' rights of occupancy are set forth in the petition here and in the Circuit Court's opinion.

While the petition for condemnation sought a leasehold interest for the entire building for a term ending June 30, 1945 with the right of surrender on June 30, 1943 or June 30, 1944 (R. 3), there was no condemnation of the building. After the tenants were evicted by the order of possession the Government abandoned its condemnation proceedings against the owner by negotiating a lease with him. Up to the time of the pre-trial the landlord had no idea that the Government was contending that he had to pay the tenants out of the consideration received by him from the Government (R. 115-116). The Government here has apparently abandoned that contention. Negotiations with the owner for a lease continued right up to the time of trial which commenced March 30, 1943 (R. 149) when it

developed that the Government had entered into a lease with the landlord, Mr. Richards, covering a lease only from about March 28, 1943 to June 30, 1943 with an option to renew each year for ten years (R. 317-318). This lease made no provision either on the part of the Government or the landlord for payment of anything to the tenants (R. 567-568).

There never was any condemnation of the owners' property, either of the fee or of a leasehold interest. The Government joined in the motion to dismiss the case against the landlord (R. 568). The Government did not appeal from the judgment of dismissal of the landlord (R. 68-74).

The tenants were summarily evicted from premises they had occupied for years. Never at any time were they or have they been offered any compensation by the Government, which has always contended, as it does here, that they were entitled to nothing (R. 9-52, 89, 91-92).

The Government never has had a settled position in these cases. At the pre-trial it claimed it was condemning real estate, (R. 135), then that the jury must determine the reasonable rental value of the building to June 30, 1945, and that whatever the owner gets he will have to pay out to the tenants (R. 116), in spite of the fact that the Government had already insisted that the tenants were not entitled to anything (R. 93, 95, 103), and then it abandoned all proceedings against the landlord and made a three-month renewable lease with him.

On page 5 of its brief herein, the Government neglects to state that in testifying on behalf of some of the respondents, F. Orin Woodbury was expressly told that in considering evidence as to removal costs, reinstalling

equipment, cost of renovating or remodeling and the like he was not to consider such evidence as independent items of damage, but only as having a bearing on the value of the occupancy of the tenants' premises (R. 291). This was emphasized repeatedly in the trial. No evidence in the case was directed toward loss of profits, good will or loss of business (R. 160-161), and no such elements were ever presented to or considered by the jury. There is no question of "consequential damages" in this case and the Government's use of that term is inaccurate.

On page 6 of its brief herein, the Government gives the impression that the court left it to the jury to determine whether the measure of damages should be cost of moving, etc. Exactly the opposite is the fact. While the court admitted evidence of our damages he in effect told the jury to disregard it, the jury did so, and their verdicts are only a small fraction of our actual losses. In his instructions to the jury he said "that cannot be the measure of the rights of recovery. That is not 'just compensation'." The jury was definitely instructed that the Government was not called upon to award expenses of moving, etc. (R. 569-574).

REASONS FOR NOT GRANTING THE WRIT

On pages 7 and 8 of its petition here under the heading "Reasons for Granting the Writ" the Government has incorrectly stated the record. The United States did not condemn the Old Terminal Building for a period expiring June 30, 1945, or for any period. There was no condemnation of the building. It entered into a three months lease with the owner of the building with renewal privileges each year for ten years (R. 317-318). The Circuit Court did not concede that "the lease acquired by the Govern-

ment was for a term extending beyond the expiration of the lease owned by each of the tenants, with the exception of the Independent Pneumatic Tool Company and possibly with the exception of the lease owned by the Petty Motor Company." That quotation from the Circuit Court's opinion is the statement by the Circuit Court of the Government's contention, the same there as here. The Circuit Court did not agree with it. The Circuit Court said in answering this contention, "the basic principles announced in the General Motors case are not confined to the narrow facts involved therein." The term of the three months lease acquired by Government did not extend beyond the expiration of the leases of any one of the tenants.

Again on page 8 of its petition the Government gives the erroneous impression that the court allowed the jury to award us moving costs, etc.

There is no reason for granting this writ. The judgments against the Government were far less than they should have been, and under express instructions the jury failed to consider and ignored evidence of our actual losses. We are the injured parties. For example, Grocer Printing Company was given a judgment for \$3,000.00 while its actual out-of-pocket expense and money loss by reason of its eviction by the Government was nearly \$10,000.00 (R. 186). The Galigher Company was awarded \$2,500.00, and its actual out-of-pocket expense is nearly \$5,000.00 (R. 269). Chicago Flexible Shaft Company was awarded \$1,800.00, and its actual out-of-pocket expense is nearly \$3,500.00 (R. 230). And so with the other tenants. In other words, all of the tenants were damaged far more than the amounts of the verdicts given them by the jury. Their rights of

occupancy were taken and far less than their value awarded.

Under the heading "Questions Presented" on page 2 of its petition herein, the Government propounds the following:

1. Whether tenants occupying property condemned by the United States for temporary use for a period longer than any of the existing leases are entitled to prove moving costs and consequential damages resulting from the moving as evidence of the value of their interests.

2. Whether month-to-month tenants are entitled, upon condemnation of the leased property by the United States, to compensation based upon such indefinite period of time as the jury should conclude the tenants might have continued to occupy the property.

The assumption is incorrect that the United States condemned property for a period longer than any of the existing leases, that consequential damages were considered, or that the jury awarded compensation for an indefinite period of time. The jury was told to find the value of our "occupancy," as of the time it was taken.

The real question presented is whether or not the Government may ruthlessly and recklessly confiscate private property without paying just compensation. These tenants had been in possession of their premises and business homes for many years. The Government contends it can oust them summarily without any compensation. Whether or not it destroys them is immaterial. It claims it is under no obligation to compensate them only because they had no written leases. This cannot be the law. It offends common sense and ordinary honesty. As said by the Circuit Court

of Appeals below, "the Government would in this case convert the Fifth Amendment from a guarantee of just compensation into an instrument of confiscation".

This court pointed out in the General Motors case, (323 U. S. 373) in discussing the word "property", that "the Constitutional provision is addressed to every sort of interest the citizen may possess", and later under the text of head note 4: "The right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value." "Though the meaning of 'property' as used in * * * the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law." *U. S. ex rel. T.V.A. vs. Powelson*, 319 U. S. 266. The tenancies here under Utah law, are property, Utah Code, Annotated, 1943, 104-60-3(2). Because a lease contains a clause that the lessee would remove upon ten days notice gives a condemnor no right under this clause, no such notice having been given. *Shipley vs. Pittsburgh, C. & W. R. Co.*, 216 Pa. 512, 65 Atl. 1094, "nor is the right of a tenant to damages or injuries to a leasehold defeated by the fact, that under the lease, the owner may terminate the tenancy on short notice." 18 Am. Jur. Sec. 232, page 866. See also *Des Moines Wetwash Laundry vs. City of Des Moines*, 197 Iowa 1082, 198 N.W. 486; *A. W. Duckett Co. vs. U. S.*, 266 U. S. 149.

As stated by the trial court's instructions and the Circuit Court of Appeals below, the month-to-month tenants had a right so far as the Government is concerned to remain in the possession of their premises forever. No one except their landlord had the right to dispossess them. For upwards of 20 years and more several of them

had been in possession and built up large and lucrative businesses without written leases. The United States had no rights of the landlord when it evicted us. It did so solely under its right of eminent domain. Under the Fifth Amendment when it evicts or condemns by virtue of this right it must pay just compensation. The Fifth Amendment would be a dead letter and "a sword instead of a shield" if the Government's contention in this case is true. No enemy invader ever more ruthlessly confiscated property, nor disclaimed responsibility for the damage it inflicted more cold bloodedly, than has the government in this case. It claims the right to confiscate, and that it is immune from liability.

In the General Motors case this court points out the dangers of approving what the Government did here. If the Government may oust long established tenants under the guise of a three-months renewable lease, it may oust them under the fiction of a one-day renewable lease and destroy not only the tenants' businesses, but the owner's property under the sophistry that it has taken nothing from them.

Cases with reference to the condemnation of real estate numerous cited by the Government are of little help in solving the problems here.

To the word "taken" in the Fifth Amendment has now been added by almost unanimous decision the words "or damaged". *U. S. vs. Chicago B. & Q. R. Company*, 82 Fed. 1131, 139, certiorari denied, 298 U. S. 690. No argument is or should be needed with regard to whether or not the Government took our property. We were ousted and it went into possession.

Both the General Motors case and the Circuit Court below adequately discuss the question of "just compensa-

tion" which is not market value in this class of a case. This court in the General Motors case, under the text of head-note 2, says: "In the ordinary case, for want of a better standard, market value, so called, is the criterion of that value. In some cases this criterion cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual value."

"When the ordinary measure of loss (decrease in actual or assumed 'market value') cannot be applied, as here, then 'whatever is necessary to be considered in order to determine what is an equivalent for the appropriation of private property is germane to the question of compensation.'" *U. S. vs. Wheeler*, 66 Fed. (2d) 977, 984 (Eighth Circuit).

No question of loss of profits or loss of business or other consequential damages is present in this case. In the case of *U. S. vs. Chicago B. & Q. R. Company*, supra, the Circuit Court distinguishes between direct and consequential damages in these words:

"But obviously, confusion is found in the cases, and this confusion has seemingly misled learned counsel for appellant. This confusion comes, we think, from a failure to distinguish as to the origin of the independent cause. If the latter arises from the act of another person and so could have been obviated or prevented, or from natural causes acting abnormally, e.g. acts of God, damages arising from the original act are not recoverable, for they are consequential merely, and not proximate. But if the hurtful result shall arise from the original act done, perforce, or plus the normal operation of well known, uncontrollable and immutable

laws of physics and natural forces, we are incapable of either following or agreeing to the distinction." (Page 136)

"The war or the conditions which followed it did not suspend or affect these provisions" (the Fifth Amendment) *Monongahela Nav. Co. vs. U. S.*, 148 U. S. 312, 327.

The Government takes the position in its petition that because it needs housing for office purposes or military personnel during war it is justified in doing anything it desires. In the *Monongahela* case it is said: "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

The words "just compensation" have no technical or purely legal significance. They are in themselves expressive of the meaning intended. *National Laboratory and Supply Co. vs. U. S.*, (E. D. Pa. 1921), 275 Fed. 218.

The Government complains that the jury awarded us \$10,000.00 when our actual damage was three times this sum and yet merely in renovating and remodeling our premises to suit its convenience the Government expended \$78,000.00 up to the time of the trial (R. 109-112), and actually spent \$100,000.00 with an additional \$22,000.00 for a cafeteria in the basement, and then the Army abandoned the whole thing in less than a year.

The Government contends that it should have the benefit of the provision in the Independent Pneumatic Tool Company lease; that the lessee should not be entitled to any part of an award if the lease is taken by condemnation. This was an agreement between the lessor and the lessee and was for the benefit of the lessor, not the Government,

also, there was no award to the lessor of which the lessee might claim a part, nor is the lessee claiming any part of any award. Provisions such as the foregoing, might be applicable to cases where the fee is condemned, but have no application under the circumstances here.

On page 12 of its brief the Government again makes the erroneous assertion that it took the premises until June 30, 1945. The Government repeatedly asserts that we did not possess any enforceable rights to occupy or use property, but were only tenants by permission. Nothing is further from the fact. As against all the world, including the Government we had an absolute right of possession from which no one could oust us unless the landlord did so by notice which was never given, or the Government did so by condemnation upon payment of compensation for what it took from us.

It is difficult to understand why the Government persists in piling up financial losses upon these respondents. It was the aggressor. It has never offered them one cent. It dragged them through a long, expensive and tedious trial with no theory to guide the Court, secured inconsequential awards against it, forced them to the Circuit Court of Appeals at tremendous expense on its own and their account, lost in both courts and now asks this Court to permit it to diminish further the meager damages secured by the tenants by requiring them to incur the additional expense of going through the whole thing again here. In this case there is no reason why the Government should be allowed to continue to pile up additional expense on these tenants until the entire amount of their awards is consumed in useless litigation.

The final argument of the Government is a peculiar one: That because it needs space for offices and housing during the war it should prevail in this case. Why we instead of the entire citizenry should bear this cost is not made clear. The Government instead of arguing to this Court that it has the right of confiscation should be urging this Court to protect the citizen from confiscation. The very reason the Government claims it needs these properties is to aid in the prosecution of a war to destroy the philosophy that Governments may confiscate citizens' property with impunity and without compensation. There is just no reason in the argument that the Government makes. The Government has not been injured in this case, but has seriously injured us. The verdicts against it are far less than they should have been, and it should not be permitted to harrass us longer. Its substantial rights have not been affected. No federal question in conflict with decisions of this Court is involved. The Writ should be denied.

Respectfully submitted,

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NOS. 77-83

Office - Supreme Court, U. S.

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CHARLES ELMORE GROFFLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

PETTY MOTOR COMPANY

UNITED STATES OF AMERICA, PETITIONER

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MERRILL J. BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL COMPANY

UNITED STATES OF AMERICA, PETITIONER

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THE GALIGHER COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

GRAY-CANNON LUMBER COMPANY

BRIEF OF RESPONDENTS

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UNITED STATES OF AMERICA, PETITIONER
v.
GRAY-CANNON LUMBER COMPANY

BRIEF OF RESPONDENTS

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 621-624) is reported in 1942 F. (2d) 912.

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JURISDICTION

The judgments of the Circuit Court of Appeals were entered on March 5, 1945 (R. 625-626), and petition for certiorari was filed in this Court May 15, 1945. The peti-

tioner invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. Respondents assert that there is no impelling reason for a review of the judgments of the Circuit Court of Appeals, particularly in view of Rule 38, Paragraph 5(b), of the rules of this Court and title 28, Section 391 U. S. C. A. (Judicial Code, Section 269, amended.)

QUESTIONS PRESENTED

The petitioner (hereinafter referred to as the Government) presents two questions as follows: (Page 2, Governments Brief)

"1. Whether tenants occupying property condemned by the United States for temporary use for a period longer than the tenants' existing leases are entitled to prove moving costs and consequential damages resulting from the enforced removal as evidence of the value of their interests.

"2. Whether month - to - month tenants are entitled, upon condemnation of the leased property by the United States, to compensation based upon such indefinite period of time as the jury should conclude the tenants might have continued to occupy the property."

These questions will be considered specifically when we discuss the Government's brief. At the moment, however, we make this comment:

The first question presents matters that are not present in any of these cases. The United States condemned no property for a temporary use for a period longer than any of the existing leases and no tenant endeavored or was permitted to prove consequential damages as evidence of the value of its interests.

The second question likewise presents no problem involved in these cases. There was no effort to award and

no award was made of compensation to any tenant based upon any indefinite period of time the jury should conclude the tenant might have continued to occupy the property. The jury were told to find the present value of the tenants' occupancy and to award compensation based upon that value. The verdicts of the jury do not contain any compensation for any consequential damages or for any indefinite considerations.

Our argument in favor of sustaining the judgment of the Circuit Court will be presented under four propositions:

(I) The substantial rights of the Government have not been affected by the judgments herein, nor is the Government in any position to make complaint here against either of the lower courts.

(II) The respondents' tenancies, whether month to month or otherwise, gave them the right to occupy their premises which were their business homes, and such tenancies and right of occupation were property.

(III) Respondents' property was taken for public use.

(IV) For their property taken by the Government for public use the respondents are entitled to just compensation—the value of their tenancies or rights of occupation at the time they were taken. Market value and just compensation are not always synonymous, particularly in determining the value of leases. Evidence admitted in these cases is relevant in determining just compensation, even upon the "market value" basis. The verdicts for the tenants are not more than they were entitled to under the Fifth Amendment.

We shall discuss the Government's "Questions Presented" and its argument later in this brief after we have presented to the Court our discussion of the four fore-

going propositions presented in favor of sustaining the judgment of the Circuit Court.

STATEMENT

The Government's statement is inadequate and in some particulars inaccurate. It does not give this Court a true or complete picture of the cases and make assumptions not present. The circumstances in these cases are unusual and unique, and proper consideration of them requires an adequate statement of the factual background. Attempting to reconstruct the Government's statement and correct inaccuracies therein so as to make it complete would be unsatisfactory and would not save either time or space. We, therefore, take the liberty of making our own statement.

Preliminary to making our own statement may we note that on Page 3 of the Government's brief it is recited that the Court granted the Government exclusive possession and "by consent fixed a series of dates" for the tenants to vacate. The impression should be corrected at the outset that the tenants consented to their ouster from their premises. Exactly the contrary is true. The tenants were required on one day's notice to appear and show cause why they should not be ousted forthwith and the dates of their removal were the latest dates to which the Government would consent. Believing that great urgency existed for the need of their premises the tenants did exercise the utmost diligence in tearing up their establishments regardless of personal loss, but none of them agreed to move or would have moved had they not been compelled to do so by these proceedings. When the Government stated in Court that the tenants were "given" until certain dates to vacate, the Court immediately corrected this statement as follows: "No, I didn't give it to them. It was agreed to by the Government agents." (R. 153). We never had any voice

in whether or not we would move or the date when we should move. We were given no consideration whatsoever at any time from the beginning until the present moment.

Among other inaccuracies in the Government's statement, we note on Page 4 of its brief it is stated, "The tenants' claims for compensation were based principally upon expenditures incurred in moving out of the Old Terminal Building," etc. Not only was no evidence submitted for the purpose of recovering such expenditures, but the Court expressly instructed the jury that such items did not constitute just compensation. All the evidence was directed only towards determining the value of the tenants' right of occupation of their premises.

On Page 5 of its brief, the Government asserts that at the trial it contended, "that the only issue between the United States and the various defendants, including the owner and the tenants, was the fair rental value of the entire building for the period taken and that the apportionment and distribution of the sum thus determined was a matter to be worked out between the landlord and the tenants," citing *Carlock v. United States*, 53 Fed. 2d, 926, 927. This statement we shall advert to later in view of what actually happened below and the present position assumed by the Government on that point. We shall also point out that *Carlock v. United States* is an authority against the Government under the facts herein, and also why the Government itself made it impossible for the lower court to adopt the Government's contention.

On Page 6 of its brief, the Government gives the impression that all of the tenants attempted to plead loss of profits in their answers. Only the Gray-Cannon Lumber Company and Petty Motor Company answers contained any such allegations and at no time was any evidence received or considered relative to loss of profits.

On Page 8 of its brief, the Government's summary of the Court's instructions is so incomplete as to convey a meaning entirely different than that actually announced by the trial court.

The foregoing matters are but illustrative of the necessity of making a complete statement which we shall now attempt to do.

The Old Terminal Building in Salt Lake City is partly shown in Exhibit 5 (R. 579). (The Exhibit was received for the purpose of showing the Galigher Company sign) (R. 248). The building extends almost to the higher building shown in the right-hand portion of the Exhibit (the Dooly Block mentioned in the record as the former location of the Post Office and Federal Court) (R. 490-491). The Old Terminal Building is in the center of the mining-machinery district in Salt Lake City and especially desirable for the purposes of respondents, its former tenants, which desirability was lost by their removal (R. 187-190, 226-227, 249-252). In the record are included Government's Exhibits A to N, inclusive (R. 595-619). After offering and having these exhibits received in evidence, the Government made no further reference to them at the trial, in the Circuit Court, or here. There was no justification for such exhibits in this case, since none of them portray any of the tenant's premises (R. 370), and are the worst looking pictures that could be made of the unoccupied portions of the building (R. 370). Most of them were taken either after the Government moved in and commenced renovations or after Mr. Richards took possession and started making repairs (R. 349, 351, 352).

On November 9, 1942, the Government filed a petition for condemnation (R. 3-5). The title to the proceedings indicates that they were to acquire 7/10ths of an acre of land,

whereas no effort was made to acquire the title or fee to any land. The action was brought under authority of the Second War Powers Act (Appendix, page 42, Government's brief), of March 27, 1942, 56 Stat. 177, C. 199, Sec. 201 (50 U. S. C. A. App., Supp. 3, Section 632). Under this Act, the Secretary of War was authorized "to acquire by condemnation, any real property, temporary use thereof, or other interests therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes." The petition recites that the Secretary of War requested the Attorney General to institute this action for the purpose of acquiring the real property involved in this action, including the building thereon, known as the Old Terminal Building, to be used to house the offices of the Pacific Division of the Army Engineers, but later in Paragraphs 3 and 4 of the petition it appears that what is actually sought by the proceedings is a lease of the building expiring June 30, 1945, or at the election of the Government, June 30, 1943. Actually then, the condemnations proceedings sought only the immediate possession and the temporary use of the Terminal Building for a period of approximately seven and one-half months, with renewal privileges at the option of the Government.

All of the respondents were made parties to the proceedings under the allegation that they were tenants and interested parties (Paragraph 3). The building was owned by W. B. Richards, Jr., who had purchased it in October, 1942 (R. 179, 211), and it was partly vacant (R. 353), the respondents being the tenants of the occupied portions (R. 3-5). The Utah statute governing parties defendant in condemnation proceedings, Sec. 104-61-8, Utah Code Annotated, 1943, provides:

"All persons in occupation of, or having or claiming an interest in, any of the property described in the

complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him, in the same manner as if named in the complaint.

Thus under the Utah statutes, even persons merely in occupation, as well as persons having other interests in the property, may appear and present their interests separately. The Government made each of the respondents a party upon the allegation that they were tenants and parties in interest in the proceedings.

At the time these proceedings were instituted some of the tenants had been in possession under four different owners (R. 218), and all of them under owners other than Mr. Richards. Mr. Richards desired all of the tenants to stay on and they were all satisfactory to him. None of the tenants desired to move or intended to move (R. 109). At the time these proceedings were instituted there was a definite shortage in Salt Lake City of available business space (R. 275). This appears also from the testimony of each tenant and each expert of both the Government and the tenants.

The Grocer Printing Company (Mr. Grimsdell) had occupied its premises in the Terminal Building for twenty-six years as a printing establishment (R. 155-156), twenty-one years of which were without any written lease (R. 161). At the time of its ouster it had twelve employees, was doing an annual volume of business of \$60,000.00 (R. 162), had to remove heavy presses and machinery weighing approximately sixty thousand pounds, most of which were accommodated in the Terminal Building by special supports installed by the tenant, was compelled to sign a 5-year lease for new quarters at greatly advanced rental, in addition to paying heavy moving and other expenses made necessary

by the ouster totaling actual out-of-pocket expense and damage in the total sum of \$9,741.34 (Summary R. 184-186). The value of this occupancy at that date was testified to be \$12,500.00 (R. 293). The jury allowed \$3,000.00 (R. 58).

The Chicago Flexible Shaft Company (Mr. Wiggs) had occupied its premises in the Terminal Building without a written lease for twenty-six years. Both it and the Grocer Printing Company had been under four different landlords (R. 218); at the time of the ouster was doing between \$200,000.00 and \$250,000.00 worth of business a year at those premises; had a \$50,000.00 stock which had to be moved; employed seven people (R. 217); was compelled to pay a \$500.00 bonus for a lease (R. 223), entering into a written lease at an advanced rental and heavy moving and renovation expenses in a less desirable location, all as a result of these proceedings. The total out-of-pocket expense of this company was \$3,414.75 (R. 230). The value of its occupancy was \$4,500.00 (R. 294). The jury allowed it \$1,800.00 (R. 64).

The Galigher Company had been in its premises in the Terminal Building without a written lease for eighteen years (R. 245). At the time of the ouster it was doing a business totaling a million dollars a year. It had forty-four employees. Its premises were specially fitted and constructed for its business, which is international in its scope, and for approximately eight years all of its national advertising had been identified with a picture of its location in the Terminal Building (R. 246-249). It also had heavy expenses and increased rent to pay because of the taking of its premises (R. 268-269). Its out-of-pocket expense was \$4,949.15 (R. 269). Its occupancy was worth \$7,500.00 (R. 294). The jury allowed it \$2,500.00 (R. 54).

The Independent Pneumatic Tool Company had been in its premises under a written lease for a term from October 24, 1939, to November 30, 1942, which was renewed in August of 1942, for an additional term of five years (R. 190). The Government contended that this company had no lease at the time of its eviction (R. 485-487), but now argues in its brief that this tenant has no right to any compensation because of this provision in the lease, which it formerly contended did not exist. "If the whole or any part of the demised premises shall be taken by Federal, State, county, city or other authority for public use, or under any statute, or by right of eminent domain, then when possession shall be taken thereunder of said premises, or any part thereof, the term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the lease." (R. 202). The order of possession required this tenant to vacate November 17, 1942 (R. 7). The Government now apparently concedes that despite this provision, the Government is primarily liable to the tenant (Government's Brief, page 12; on Petition for Certiorari and pp. 26, 27, last brief). This lease will be discussed later in considering the Government's argument. This company at the time of its ouster employed eight persons and was doing an annual business of \$140,000.00 (R. 190-192). It likewise had to enter into a written lease for five years at increased rent in a less desirable location (R. 195), in addition to paying and incurring expenses, all caused solely by these proceedings in the sum of \$1,584.31 (R. 198). The value of its occupancy was \$3,500.00 (R. 293). The jury allowed it \$600.00 (R. 56).

The Gray-Cannon Lumber Company had been in possession of its premises under a written lease from August,

1938, until August, 1941. A new lease was drawn up for an additional three years which had not been signed at the suggestion of the landlord's agent in order to get the premises fixed up before the lease was signed (R. 323). This tenant also offered evidence of the rental value of the premises in addition to its actual expenditures made necessary by these proceedings; was unable to relocate and could not continue the business that had formerly been conducted at these premises (R. 331-333). This company had fitted its premises for its business as a lumber warehouse and office (R. 326), and sustained moving costs and loss in depreciation of its stock many times more than the \$1,700.00 (R. 65-66) allowed it by the jury.

Merrill J. Brockbank, another tenant, claimed an actual loss of \$1,927.80 (R. 395) as a result of his ouster. He had been in the Terminal Building for fourteen years at an annual business of between \$40,000.00 and \$45,000.00 (R. 376), without a written lease (R. 382). The jury allowed him only \$400.00 (R. 62).

The Petty Motor Company, the only tenant the Government concedes had a lease, offered expert evidence of the value of the unexpired term of its lease, to which evidence the Government objected. "Mr. Clay: I object to that, if your Honor please. I think it goes in under the general objections." (R. 471). The jury actually allowed this tenant \$360.00 (R. 60), although it offered evidence that the loss it suffered was \$3,373.31 (R. 459). Although the Government made no motion for a directed verdict as to this tenant (R. 566), it, nevertheless, has appealed from this judgment and lumps this case in with the rest and asks for a reversal of this along with the others.

The Government offered no evidence as to any of the tenants upon which just compensation could be based, or of the rental value of the entire building. None of the evidence

of expenditures, costs, or increased rent was introduced or received as independent evidence of the value of the individual tenants' occupancy or of the amounts to be allowed as or in addition to such value. There was no attempt to introduce evidence or recover for loss of business, loss of profits, or destruction to business (R. 160-161).

F. Orin Woodbury, characterized by the Government in its brief as "a real estate agent" (Page 6), was definitely instructed in giving his opinion of the value of the occupancy of the premises on the date of their appropriation not to consider evidence of expenditures, costs, increased rent and the like as independent evidence of the value of the occupancy; that that evidence was only to be considered as an aid in determining the value of the occupancy (R. 291-292). He fixed the value of the occupancy of the Grocer Printing, Independent Pneumatic Tool, Chicago Flexible Shaft, and Galigher Companies as above indicated. He also testified that a month-to-month tenancy is valuable, but it cannot be sold on the market (R. 312). This is very different than the impression conveyed by the Government in its brief (Page 6), that the tenancies had no value because they could not be sold on the market, and that Mr. Woodbury's valuation was made up from these costs. Mr. Woodbury, instead of being a real estate agent, is the General Manager of the Woodbury Corporation, engaged in brokerage, property management, appraising, and one of the two certified property managers in this state (R. 271), one of the seven persons employed by the Government from the entire United States to direct the decentralizing of governmental departments and in the removing of them from Washington, D. C., to New York, Philadelphia, St. Louis, Richmond, Chicago, and other places, and in negotiating for the use and occupation of offices and buildings for the departments moved (R. 272-273). He had a wide experience in Salt Lake City in property management and in values to

tenants of long standing of the space occupied by them; was personally familiar with the old and new locations of the individual businesses of the tenants, of the shortage of available space, of the long occupancy and particular nature of the tenants' businesses, and the value because of being located in the center of the mining-machinery district, the type of business catered to and engaged in by three of the tenants (R. 272-292). Mr. Woodbury was the only expert who pretended to give a comprehensive valuation to the tenants' property (R. 293-294). Even the Government's experts admitted that written leases may be a distinct disadvantage and that there may be a definite advantage in oral leases; that it depends on the circumstances in each individual case whether it is an advantage or disadvantage (R. 492). Of course, this is obvious. None of the Government's witnesses attempted to do anything more than give the reasonable rental value of vacant space, and as testified by Mr. Gaddis, did not pretend to testify about the value of the occupancy to the individual tenants (R. 492).

The day after this action was filed, these tenants were ordered to vacate their premises, most of them by November 17, a period of one week, and the latest, the Grocer Printing Company, by December 1. The Government was granted exclusive possession of the tenants' premises and the tenants were ousted therefrom (R. 7). No appraisements were ever made of our interests, none of the tenants were offered anything by the Government. They were shunted back and forth between the office of the United States District Attorney and the Army Engineers, and in the language of the United States Attorney at the pre-trial, they were still "on the merry-go-round" (R. 91-92).

In its statement (Page 7) the Government gives the impression that the trial court told the jury that it would be for the jury to decide whether the measure of damages

for loss should or should not be based upon the cost of moving and the like. This is inaccurate. At the beginning of the trial what the court said was "the measure of damages may or may not be determined by the cost of moving to the new location, the difference in rent, etc." (R. 160), indicating clearly that then he was undecided on that matter. But in his instructions to the jury at the conclusion of the trial, the court definitely told the jury those things could not be the measure of damage. (R. 573). In the pre-trial order (R. 38), the court definitely fixed the issue as the reasonable value of the premises taken so far as the owner was concerned, and with reference to the tenants, "the compensation, if any, they may be entitled to recover by reason of having to relinquish occupancy of said premises." Until the pre-trial, the landlord never knew that the Government was going to contend that all that was necessary was to pay the landlord and that it was up to him to take care of the tenants; that the only issue was the reasonable rental value of the building to June 30, 1945, and that whatever the landlord gets "he will have to pay out to the other people." (R. 115-116).

There was never any condemnation of the Terminal Building. There was never any evidence offered or received of its reasonable rental value. The Government made the reasonable value of the Terminal Building a moot question.

While the trial of these cases was proceeding in March of 1943, and after the tenants had all been ousted and their premises taken by the Government, the Government entered into a negotiated lease with Mr. Richards, the landlord, for the entire building, covering a period from about March 28, 1943, to June 30, 1943, with an option to renew each year for ten years (R. 317-318). This lease had nothing whatever to do with the tenants, made no provision for

them either on behalf of the Government or the landlord, and was solely the result of the negotiations between the landlord and the Government (R. 567-568). Neither the jury nor the court ever had an opportunity to fix the value of anything secured by the Government from the owner.

The case as to the landlord was dismissed in open court when the Government joined in a motion to dismiss at the conclusion of the trial (R. 568 and Government's brief 9). In its brief, as a footnote (Pages 3 and 4, Brief on Certiorari and p. 27 of last brief), the Government gives the impression that the dismissal was at the instance of the court and that there has been no formal judgment entered thereon. As a matter of fact, the Government joined in the motion to dismiss which was granted by the court, and each of the judgments in favor of the tenants, with the exception of the Gray-Cannon Lumber Company, expressly recites:

"It having been stipulated that the United States of America, the petitioner herein, as a result of these proceedings, had entered into a lease of said Old Terminal Building with the owners thereof, which said lease made no provision for any compensation to the defendant (naming the tenant), either by the petitioner herein or the owners of said building, and the said petition herein having been dismissed as to the owners of said building, Willard Richards, Jr., and wife." (R. 54, 56, 58, 60, 62, 64).

In its first notice of appeal, the Government recognizes that the case has been dismissed as to the owner, in this language. "Also appeals from the court's order overruling the petitioner's motion to dismiss the action as to all tenant defendants after the court had dismissed the case as to Willard B. Richards and Alice Richards, his wife—landlord defendants." (R. 68). In its notices of appeal, the Government does not appeal from the order of dismissal as to the

owner (R. 68-74), in spite of the contrary statement in its brief (page 27). In its notice of appeal to the owner it appeals only from the judgments against the tenants (R. 73-74). Both in the Circuit Court of Appeals and here the Government obliquely injects by footnotes in its brief the imputations that the dismissal as to the landlord was not at its desire and that it is incomplete.

The Government insisted that whatever the owner gets he will have to pay out to the tenants (R. 116), in spite of the fact that it also insisted that the tenants were not entitled to anything (R. 93, 95, 103). (See also Government's Brief, p. 9). The Government, by entering into a three-month renewable lease and consenting to the dismissal as to the landlord, made the value of the entire building a moot question. The lease was entered into without any consultation of the tenants or any consideration of their interests.

In view of the Government's indirect argument that the terrific expenditures of the war should cause this court to look askance at the \$10,000.00 allowed herein, because of its effect elsewhere throughout the nation, it is interesting to note that after the Government secured possession of our property, it proceeded to spend money with abandon, put in and tore out partitions, knocked out walls, covered the floors with hardwood, paid overtime, double time, paid exorbitant prices for electric lights and conduits to the tune of \$78,500.00 (R. 109-112), to make our quarters, which were perfectly adequate for us without any expenditures, meet its ideas of quarters suitable for the Army Engineers. At the time of the trial, the basement had not been put to use (R. 113). Since that time it is common knowledge that the Government installed in the basement a cafeteria, and instead of \$78,000.00, it actually spent \$100,000.00 in the remodeling with an additional \$22,000.00 for the cafeteria.

Then, after ousting us, spending all this money, it gave notice that it would vacate the entire building March 1, 1944, less than a year after the lease was entered into. These matters have a bearing on questions to be considered later in the brief. (In the footnote 13, page 29, Government Brief, it is stated that the War Department and other Government agencies occupy the building. After the Army Engineers, for whom the building was taken, moved out, O. P. A., then occupying rent free quarters, moved into the building and is now occupying most of it.)

At the conclusion of the evidence the court instructed the jury that this was not an action to condemn leases; that the Government wasn't interested in Mr. Petty's lease or any other leases; that what the Government wanted was the right to occupy this building; that it had entered into a lease with the owner of the property and in these proceedings wanted to take away from these tenants their right to occupy certain portions of the building; that these tenants' rights of occupation constituted property and property rights; that they were entitled in return for these rights taken by the Government to just compensation; that "just compensation" are words of general meaning; that the owner cannot be deprived of his property for public use without just compensation and that there had been introduced a wide range of testimony; that a lease, written or verbal, is more valuable, if it is valuable at all, and a greater liability, if it is a liability at all, than a holding at will; that some leases rebound to the advantage of the owner and some to the advantage of the tenant; that under the law of Utah the owner may give notice to a tenant at will to move out fifteen days in advance, but that nobody else can give that notice; that his tenancy is good against all the world, including the United States Government; that had the Government seen fit to take over this property by purchase or lease, it could have been in a position to give

that notice; that it did not do so, but brought suit for condemnation instead; that the tenancies in many cases had lasted for years and years, but that these holdings were uncertain and that the value of the occupancy must be considered in the light of this uncertainty; that the jury was not called upon to award the expenses of moving, improvement or arrangement or rearrangement of new quarters nor the new rent for any length of time or the difference between the old rent and the new rent. "That cannot be the measure of the rights of recovery." That if the tenants have not been deprived of anything, if they are just as well off as they were before, they would not be entitled to recover anything. Now that they have moved, was their right to occupy their old premises of greater value than they were paying? "That is a question for you to determine. What length of time would that occupation fairly and reasonably cover, taking all of the evidence in the case with respect to each individual tenant?" (R. 569-574).

The jury followed the court's instructions and did not allow the costs of moving, renovating, increased rent, and its verdicts positively indicate that if it considered these items at all, it did so only as incidental in determining just compensation to be paid for the taking of the tenants' property by the Government herein.

The jury's verdicts are only a fraction of the actual money loss to the tenants directly resulting from their eviction.

ARGUMENT

Introductory

The facts and circumstances in the instant cases are unique. Precedent so far as analagous facts are concerned

is non-existent. Cases where the entire fee is condemned, whether subject to leasehold interests or not, or where the entire estate of both the landlord and the tenants is condemned, are not controlling and frequently are not particularly enlightening. However, principles announced by this Court and by other federal appellate courts were helpful and controlling guides to us and the trial court in attempting a solution of the problem presented here. Since the General Motors decision it seems clear to us as it did to the Circuit Court of Appeals that this Court in that case applied and reaffirmed those principles announced by the Court for more than fifty years in case after case involving the proper application of the Fifth Amendment. While the facts in the General Motors case are novel, the law applied thereto is not new. Cases cited and applied in the General Motors case are from a long line of decisions uniformly announcing established principles which in turn were applied to the facts presented in that case.

We know of no case in this Court, where property has been taken for a public use, that compensation has been denied. Certainly not upon the ground that the property taken had no value because the condemnor after taking it claimed through the process of definition that it never existed.

SUMMARY

Point I.

THE SUBSTANTIAL RIGHTS OF THE GOVERNMENT HAVE NOT BEEN AFFECTED BY THE JUDGMENTS HEREIN, NOR IS THE GOVERNMENT IN ANY POSITION TO MAKE COMPLAINT HERE AGAINST EITHER OF THE LOWER COURTS.

In the lower courts the Government was not consistent in the various theories it urged upon the courts; abandoned

principles it had once advocated; asked the courts to adopt theories which were conflicting with each other; has changed its theory in this Court from the theory insisted upon in the lower courts; gave the trial court no help whatever, and by entering into a negotiated lease with the landlord eliminated from the case the principle for which the Government contended throughout the trial. Also, the substantial rights of the Government are not affected because even had there been error in the admission of evidence and in the instructions to the jury—which there was not, the jury's verdicts are not based in whole or in part upon any evidence or instructions of the court objected to by the Government, and are far less than the respondents were entitled to receive.

Point II.

THE RESPONDENTS' TENANCIES WHETHER MONTH TO MONTH OR OTHERWISE GAVE THEM THE RIGHT TO OCCUPY THEIR PREMISES WHICH WERE THEIR BUSINESS HOMES, AND SUCH TENANCIES AND RIGHT OF OCCUPATION WERE PROPERTY.

All of the respondents, with the exception of the Petty Motor Company, were tenants without written leases. We are considering the Gray-Cannon Lumber Company and the Independent Pneumatic Tool Company the same as the other tenants. The Government contended that neither one of them had a lease, and we will accept that contention so the Government cannot complain if we accept and adopt its own theory at the trial with reference to these two tenants. All of these tenants were completely evicted and their premises were wholly occupied by the Government. There is no question in this case of moving back to the Terminal Building at the expiration of the Government's occupation, no claim for loss of business, loss of profits, or for payment of the value of machinery or equipment. No tenant asked

for anything except the present value of his right to occupy his premises in the Terminal Building. "Property" as the word is used in the Fifth Amendment includes such tenancies as those of the respondents in the Terminal Building.

Point III.

RESPONDENTS' PROPERTY WAS TAKEN FOR PUBLIC USE.

The early limitation upon the word "taken" is not now accepted. The idea that only that which actually physically is appropriated is "taken," is erroneous. If the taking results in depreciation, destruction or loss of use of property other than that actually physically appropriated, such depreciation, destruction or loss of use may be considered in determining just compensation for that which is taken. However, in the present cases, no award was asked and none was given for any depreciation, destruction or loss of use of property. We did not ask compensation for our fixtures or for any of their value. All that we asked was for that which was actually taken—just compensation for our occupancy, our business homes, our premises. All evidence was received only as aids in measuring that value.

Point IV.

FOR THEIR PROPERTY TAKEN BY THE GOVERNMENT FOR PUBLIC USE THE RESPONDENTS ARE ENTITLED TO JUST COMPENSATION—THE VALUE OF THEIR TENANCIES OR RIGHTS OF OCCUPATION AT THE TIME THEY WERE TAKEN. MARKET VALUE AND JUST COMPENSATION ARE NOT ALWAYS SYNONYMOUS, PARTICULARLY IN DETERMINING THE VALUE OF LEASES. EVIDENCE ADMITTED IN THESE CASES IS RELEVANT IN DETERMINING JUST COMPENSATION, EVEN UPON THE "MARKET VALUE" BASIS. THE VERDICTS FOR THE TENANTS ARE NOT MORE THAN THEY WERE ENTITLED TO UNDER THE FIFTH AMENDMENT.

In determining just compensation it is proper to consider those elements which would be considered by a vendor and vendee fairly seeking to arrive at a fair figure which would be paid the vendee and accepted by the vendor for the particular thing sought by the condemnation. Consideration of the cost of moving equipment and machinery and like expenses does not involve consideration of consequential damages. In these cases no effort was made to secure payment for consequential damages, the verdicts contained no awards for consequential damages, and the use of the words "consequential damages" in these cases is inaccurate and a misnomer. The verdicts on their faces show that the jury made no attempt to award moving costs, increased rent, expenses of new premises and the like—the verdicts in each instance being far less than the actual out-of-pocket expense of the respondents, and far less than the actual value of their leases. No elements were considered and no evidence was received in these cases that would not be fairly considered between a vendor and a vendee, the vendor and vendee trying fairly to arrive at a fair figure to be paid a tenant for his business premises.

Point I.

THE SUBSTANTIAL RIGHTS OF THE GOVERNMENT HAVE NOT BEEN AFFECTED BY THE JUDGMENTS HEREIN, NOR IS THE GOVERNMENT IN ANY POSITION TO MAKE COMPLAINT HERE AGAINST EITHER OF THE LOWER COURTS.

(a) *The substantial rights of the Government are not affected. Title 28, Section 391, U. S. C. A., provides in part as follows:*

*"(Judicial Code, Section 269 amended.) New trial; harmless error. * * * On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give*

judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

In view of this section and cases too numerous to cite interpreting it, it is difficult to see any merit in this appeal. The Government was not our landlord, but it took our property, our business homes, evicted us from our premises peculiarly adapted to our businesses, where we had become established throughout the years, damaged us to the extent of thousands and thousands of dollars as a direct and proximate result of that taking and seeks to avoid any compensation for the taking. It spent in excess of \$100,000.00 in remodeling our premises to make them satisfactory for its use, when they required no such expenditures to satisfy our requirements, and because the jury awarded us \$10,000.00, a mere token payment in comparison with our actual loss, the Government complains. The verdicts were extremely favorable to the Government.

Under the Fifth Amendment private property cannot be taken for public use without just compensation. If this provision is to be construed as contended for by the Government, then "it becomes almost as much a sword as a shield to the private citizen," and to say that our property has not been taken is to say that what has actually happened never occurred. Even had the court directed the jury to award us our moving costs and increased rent, the Government could not complain because the jury did not do so. In every instance it gave us far less than justice and equity should require. In view of what the court actually instructed the jury and what the jury actually did, there was no injury to "the substantial rights" of the Government. The shoe is on the other foot. We felt we were entitled to far more liberal instructions

than were given, since, as we shall show, the authorities generally hold that the provisions of the Constitution shall be liberally construed to protect the private citizen and shall not be construed to enable the sovereign to confiscate private property by the aid of technical refinements or abstract definitions. Just compensation means just compensation. It means fair dealing. If the Fifth Amendment affords us no protection from this confiscation, it is meaningless.

Neither of the questions presented by the Government's Brief are relevant under the facts in these cases. The jury did not award us moving costs or consequential damages, nor did it award us compensation for an indefinite period of time. Regardless of any evidence received or any instructions given by the court, it is evident from the amount of the verdicts herein that the Government has not been injured. The actual money damages to the tenants are three times the amount of the verdicts. The cases have been through three courts. "This last consideration (that it took seventy-five days to try the case) has been held to obviate reversal when the amount involved was, as here, negligible in comparison with the whole amount in controversy, and with the expense of another trial." *United States v. Chicago B. & Q. R. Company*, 82 Fed. (2d) 131, 140. See also *Des Moines Wet Wash Laundry v. City of Des Moines*, 197 Iowa 1082, 198 N. W. 486; *State v. Pingree*, 148 Pac. (2d) 336 (Utah, 1944, not yet reported in Utah Reports). In the Iowa case the Court said, "It is evident from the verdict returned that the jury correctly interpreted the instruction, and treated the evidence, not as items of damage, but as an essential guide in determining the value of the leasehold taken." In the Utah case, the state (appellant) contended that improper evidence had been introduced. But the jury's verdict indicated that it had not been controlled by such evidence. The Utah Su-

preme Court said, "In view of this fact, it becomes immaterial whether there was other inadmissible evidence received or whether the instructions complained of were erroneous." The state urged that the court rule on the admissibility of the evidence, "in order that the law thereon may be settled." This the Supreme Court refused to do, "since a decision on those points is not necessary." The judgment was affirmed.

(B) *The government is in no position to complain here.*

The Government has changed its position from day to day and from court to court. To quote Mr. Justice Holmes in *International Paper Company v. United States*, 282 U. S. 399, 406, 75 L. Ed. 410, "The Government has urged different defenses with varying energy at different stages of the case. . . . The Government exercised its power in the interest of the country and in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had."

The Government concedes (Page 5 of its latest brief here) "that at the trial" the Government contended that the only issue between the United States and the various defendants, including the owner and the tenants, was the fair rental value of the entire building for the period taken and that the apportionment and distribution of the sum thus determined was a matter to be worked out between the landlord and the tenants." Now, however, in the footnote at Page 12 of its brief accompanying the petition for writ of certiorari it admits "In view of the fact that the settlement made with the landlord in the instant case did not require the owner to indemnify the Government from claims of lessees, the United States does not deny that it is primarily liable to the tenants." It made no such admission in the trial court nor in the Circuit Court, so it

is difficult to see how it can complain that both courts refuse to adopt^a a position which the Government now admits was wrong. On Page 27 of its latest brief, footnote 11, it is difficult to understand what the Government's latest position is on this point. Apparently counsel have not yet determined whether to adopt the former position or the position announced in the preliminary brief herein. From the footnote 11 it might seem that there is some question as to whether or not the lease with the owner of the building provided compensation for the tenants. As a matter of fact, there is no doubt on this score. The lease made no provision whatever for the tenants and is strictly between the United States and the owner of the property regarding their rights only (R. 567). There was another point that the Government relied upon in the lower courts and that is that under no circumstances was evidence relevant concerning moving costs and the like. It is now settled that moving costs are relevant as evidence to be considered in determining the value of rights and property taken under eminent domain. Both positions assumed by the Government in the lower courts concededly were wrong, and before a party should be heard to complain he should first establish that he was denied something to which he was entitled and which he clearly and specifically requested from the lower court. The Government asked the Circuit Court to reverse the judgments with instructions. "First, to determine the fair market value of the estate taken (the rental value of the building as a whole), and then to apportion the award between the landlord and the tenants according to their respective interests." (Government's brief, Page 30.) Obviously, this would not be the correct solution of the problem, since the landlord is already receiving under his lease everything to which he is entitled; at the time of the trial no one knew what estate the Government had under its lease, the only thing definite being a three months' renew-

able term; nothing was taken from the landlord by eminent domain, and obviously dividing between the landlord and the tenant the rental value of the building as a whole for three months would solve nothing so far as the tenants were concerned ~~and might give the landlord something in addition to what he was entitled to under his lease.~~ The Government asked the Circuit Court to do an impossible thing. Here the Government apparently contends that we are entitled to nothing, the second paragraph of its latest brief, Page 39, reads: "It is submitted the month-to-month tenants were entitled to no compensation for the taking of the Old Terminal Building." Even this argument is modified at Page 39 of the brief by an admission found nowhere else in this case and advanced here for the first time to the effect that the most we would be entitled to would be whatever portion of fifteen days remained after the period between November 11, 1942, and our dispossession. If a month-to-month tenancy has no value, it is not readily perceived why the tenants should have the short period between November 11 and the date of our dispossession, or why the Circuit Court or the trial court is to be reversed for not determining the rental value of the building as a whole and then dividing it between the landlord and the tenants.

The fact of the matter is that on the record it has made in these cases the Government has taken no consistent understandable position and has presented to this Court no issues that are present under the facts of these records. It has presented theoretical questions which even if answered should not affect these cases because the questions presented are not present here.

The thing that the Government really wants this Court to declare is that the Government has the right without compensation to dispossess, regardless of the damage done

to the person dispossessed, any person occupying his premises on a month-to-month lease. Stated another and shorter way, the Government is seeking a declaration from this Court that the protection of the Fifth Amendment does not apply to month-to-month tenants. The results that would follow from such an authorization for governmental confiscation need not rest in speculation. They are present here in the actual damage done these tenants. Multiply this damage to the nation-wide extent that would follow any such governmental immunity from the Fifth Amendment and we would have a situation which "staggeres the imagination." (The quoted words are from Government's Circuit Court brief as to results that would follow from giving effect to Fifth Amendment in our cases.)

The Trial Court got no help from the Government; in fact, the Court finally reminded the United States Attorney, "You cannot stay in the middle of the road all the time." (R. 568). At one point, the Government's attorney stated that the rental paid by these tenants was not admissible and then almost immediately thereafter conceded that it was admissible (R. 120, 121, 122). He insisted that the Government was condemning real estate in spite of the fact that it is obvious that the condemnation petition asked for approximately a seven months' renewable lease (R. 135). Again, the Government contended that the jury must determine the reasonable rental value of the building taken to June 30, 1945, although the lease could be terminated two years earlier, and that whatever the owner gets he will have to pay out to the tenant (R. 116), in spite of the fact that the Government insisted that the tenants were not entitled to anything (R. 93-95, 103). Then it abandoned all proceedings against the landlord, having entered into a three-month renewable lease with him (R. 316, 568). During the trial the Government objected to the offering of evidence

as to the tenants who were on a month-to-month basis and yet also made the same objections to the evidence of those who had leases (R. 470-471).

In the Circuit Court the Government presented three questions:

"1. Whether the United States must pay more than the fair market value of property condemned when the property taken is subject to lease-hold interests.

"2. Whether in a proceeding to condemn the use of a building, testimony as to the expenses incurred by tenants of the building in moving out is admissible either as the measure of damages or as evidence to be considered in determining such compensation.

"3. Whether the tenants of the building condemned in this case had sufficient interests in the property to entitle them to share in the compensation to be paid for the property taken."

Obviously, Question 1, in speaking of the fair market value of property condemned refers to the Old Terminal Building as a whole. This building was not condemned. The United States was not asked to pay more than the fair market value of the property. Nobody knows what its fair market value is, and the Government's own action made that question moot.

Question 2 has been answered adversely to the Government by this Court in the General Motors case.

Question 3 had no relevancy because the tenants were not seeking to share in the compensation to be paid for the condemnation of the Terminal Building. No such question is or ever has been present in this case. No compensation is to be paid for condemnation of the Terminal Building. It was not taken by condemnation and no tenant is

asking to be paid anything by the landlord or to be paid anything from the money he receives from the Government for his building. None of the questions raised in the Circuit Court are presented here.

Under such circumstances the Government asks this Court to reverse the two lower courts upon the basis of assumed facts not present and for failing to adopt principles which were not clear to the Government itself.

The substantial rights of the Government have not been affected; the Government is in no position to complain here.

Point II.

THE RESPONDENTS' TENANCIES WHETHER MONTH TO MONTH OR OTHERWISE, GAVE THEM THE RIGHT TO OCCUPY THEIR PREMISES, THEIR BUSINESS HOMES AND SUCH TENANCIES AND RIGHT OF OCCUPATION WERE PROPERTY.

(A) The Act of Congress involved herein recognizes and provides for such rights as property.

Most cases of eminent domain involve the taking of the fee to real estate or some permanent use of real property, and are not comparable to situations present in the instant cases.

The Act of Congress involved herein contains much broader powers than are usually exercised in eminent domain proceedings. Congress knew that these powers would be used in every part of the nation and was familiar with conditions prevailing in every community wherein they would be exercised. The members of Congress come from those communities. They are a part of them. Congress passed the Act knowing that this Court has not given any narrow, restricted, or technical construction to the Fifth Amendment. Congress also knew that it was not within its

province nor within its power to define just compensation or prescribe the rules for determining it, to prescribe its limits or limit the application of the Fifth Amendment by attempting to define what is and what is not property. This Court has so held for a great many years, as will appear from citations hereafter in our brief. Congress knew that, "The war or the conditions which followed it did not suspend or affect these provisions." (Fifth Amendment). It made ample appropriation to compensate those whose property was taken under the Act in the furtherance of the war effort. Congress did not and could not directly or indirectly attempt to authorize "trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights." Congress knew that it is "a settled principle of universal law that the right to compensation is an incident to the exercise of that power (condemnation); that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle." Congress knew when authorizing the taking of "any real property, temporary use thereof, or other interest therein," that the Constitution "prevents the public from loading upon one individual more than his just share of the burdens of Government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

When Congress authorized the taking of the temporary use of real property "or other interests therein" it knew that in many, if not most, of our smaller cities and towns, written leases are not generally used. It knew that tenants occupied premises without written leases. It knew that in Utah, for instance, a tenancy from month to month is just as inviolable in the eyes of the law as a tenancy for years.

nine years. Neither the landlord nor anyone else may trespass upon such a tenancy. It is the absolute property of the tenant and gives him the absolute right to occupy that property to the exclusion of anyone else, including the landlord and the United States of America. Congress knew that business in the smaller cities and towns is not conducted as it is, for instance in New York, Chicago, and other large cities. The illustration of this is the situation existing in the present case. Of the seven tenants, those who had been in the building the longest had been there from fourteen to twenty-six years without written leases, under several different owners. There was always a mutually satisfactory relationship. It must be assumed that Congress knew of such situations generally, and that in granting the broad powers it did under the Act in question, it had such interests and conditions in mind. By authorizing their condemnation, Congress intended that compensation should be paid for them and made appropriations for that purpose because it knew that condemnation is inseparably connected with the right to compensation. The legislative authorization to condemn "other interests in real property" is a congressional recognition that such interests are property. If condemnation is the method used for acquiring them that, of itself, is a recognition of the right to compensation. The very fact that Congress recognized such rights as subjects of eminent domain and thus compensable, demonstrates that Congress considered them to be property and did not intend the Government to seize them and then deny liability on the claim they were not property, that the war and its tremendous costs required it, or for any other reason.

(B) *The respondents' tenancies were property within the meaning of the Fifth Amendment under long established decisions of this Court and other courts of last resort.*

This Court has also clearly spoken on the subject. Though the meaning of 'property' as used in . . . the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law." *U. S. ex rel. F. V. A. v. Powelson*, 319 U. S. 266, 279 L. Ed. 1390, 1400. "The constitutional provision is addressed to every sort of interest the citizen may possess. . . . The right to occupy for day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value." *United States v. General Motors*, 323 U. S. 373, 89 L. Ed. Ad. Op. No. 6, 379, 382, 383. The right to the use of anything is property (i. e. water). "There is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power, it is hard to see what more the government could do to take the use." *International Paper Company v. United States*, 82 U. S. 399, 407, 75 L. Ed. 410, 414. In our cases the tenants' rights were to the use of their premises. When those premises are taken by the Government and the tenants completely evicted, "It is hard to see what more the Government could do to take the use."

A mere franchise to occupy the streets with poles and wires for a power line is property if the law of the state in which the franchise is exercised so holds. The definition of property may be determined from the law of the state where it is located. *United States v. Puget Sound Power and Line Company*, 147 Fed. (2d) 953 (November, 1944).

Under Utah law a month-to-month tenancy is property, and no one, including the landlord, may invade it. / Section

104-60-3 (2), Utah Code Annotated, 1943, provides: (This is identical with the prior Code.)

"A tenant of real property, for a term less than life, is guilty of an unlawful detainer:

"(2) When, having leased real property for an indefinite time with monthly or other periodic rent reserved, he continues in possession thereof in person or by subtenant after the end of any such month or period, in cases where the landlord or the successor in estate of his landlord if any there is, fifteen days or more prior to the end of such month or period, shall have served notice requiring him to quit the premises at the expiration of such month or period; or in cases of tenancies at will, where he remains in possession of such premises after the expiration of a notice of not less than five days."

A month-to-month tenancy may not be terminated by fifteen days' notice even by the landlord unless the notice prescribed is served exactly as outlined in the statute (Section 104-60-6). "The basis of a suit in unlawful detainer is unlawful possession, and a tenant holding for an indefinite term on a monthly basis is not holding unlawfully until he fails to comply with the demands of a notice which has been properly served on him." *Carstensen v. Hansen*, 152 Pac. (2d) 954, 955 (Utah Supreme Court, October 24, 1944, not yet reported in the Utah reports). That was an action for unlawful detainer by the landlord against the tenant, where the fifteen-day notice was given but not served as provided by the statute. The tenant was held to be lawfully in possession as against the landlord, regardless of the fifteen-day notice.

The trial court in our cases incorrectly referred to some of the tenants as "tenants at will." Under the above quoted Utah law even a tenant at will is entitled to notice

(Sec. 104-60-3 (2), *supra*), and has such an interest in the property as will prevent the landlord from trespassing on it. In the absence of the tenant, "The Foreible Entry Statute expressed the policy that no person should enter by force, stealth, fraud, or intimidation, premises of which another had peaceable possession. This had the effect of taking away the common-law right of a landlord to possess his own property by no more force than was necessary and left the one against whom force was used to pursue his common-law action." *Buchanan v. Crites*, 150 Pac. (2d) 100, 103 (Utah Supreme Court, July 3, 1944, not yet reported in Utah reports).

Concededly in our cases the landlord gave no notice to quit to any of the tenants. The tenancies were never terminated in the usual manner. They were appropriated by these proceedings. It is, therefore, erroneous to argue that the United States took the temporary use of property "for a period longer than any of the existing leases." The trial court was correct in instructing the jury, "Now, it is the opinion of the court, and I so charge you, that these rights of occupation, whether evidenced by a term lease, written or oral, or simply a lease at will from month to month, is property, and private property within the language and meaning of the Constitution." (R. 569-570). "In the case of a tenancy at will (should have stated month-to-month tenancy), under the laws of the State of Utah the owner may give notice to the tenant to move out, and that notice, if given fifteen days in advance (should have said if given and properly served), is binding upon the tenant to move at the expiration of that period. If he does not move he can be put out by action in the courthouse. But nobody else can give that notice. His tenancy is good against all the world, including the United States Government.

"The Government of the United States, had it or its agent seen fit to pursue that remedy and that method, could have taken over this property by purchase, or by a lease, as it has done lately, as we are informed. And it would have been in a position, after doing that, to give notice.

"But it did not do that. Instead, it brought suit in condemnation, cited these people into court, and a hearing was had on the 10th of last November and order made on the 11th that they surrender the possession to the Government under condemnation proceedings." (R. 571).

"It will be noted that the instruction of the trial court was more favorable to the Government than to us, since it referred to us as tenants at will when we were not, and omitted to advise the jury that the giving of fifteen days' notice was not sufficient unless the notice was properly served as required by statute.

The Government did not become our landlord. At the time the Government leased the entire property from Mr. Richards under a three-month renewable lease, we had been out of the property approximately four months, not by virtue of any termination of our tenancies, but by condemnation. The Government had the right to elect the method it would pursue to evict us and having elected to evict us by condemnation, it must pay just compensation. "But the Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay." (Page 407) *International Paper Company v. United States*, supra.

"Any arrangement that the Government may have made later with the owner to pay to it what might be due to the tenants, or some of them, did not affect the claimant's rights. * * * Here the claimant's possession under its

lease was a part of the res, and therefore was within the implied promise to pay." *A. W. Duckett & Co. v. United States*, 266 U. S. 149, 151, 152, 69 L. Ed. 216, 219. That case holds that "A right may be taken by simple destruction for public use," and also says that even though all interests are extinguished by a condemnation of the fee, the leasehold must be paid for as well as the fee, although the condemnor may not be called upon to specify the interests that happen to exist. This is directly contrary to the contention of the Government in these cases, that all that is necessary is to determine the landlord's interests and divide that among the tenants.

"But the Constitution does not require a disregard of the mode of ownership of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. *It deals with persons, not with tracts of land.* And the question is, What has the owner lost? not, What has the taker gained?" *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 195, 54 L. Ed. 725, 727. See also *Phelps v. United States*, 274 U. S. 341, 71 L. Ed. 1083, where the United States requisitioned a pier upon which plaintiffs had a lease. The requisition was under the war powers and the United States was compelled to pay for the temporary use of the pier with interest, that "being consistent with the constitutional duty of the government as well as with common justice."

(C) *The duration of the lease does not determine whether it is property; nor may an arrangement solely with the landlord bind us.*

It makes no difference to the right to compensation that the lease may be terminated on short notice.

"A tenant's term is property, . . . the fact that the leases are terminable at the option of the railway company upon thirty days' written notice does not destroy the right of the tenant to compensation, but is a circumstance to be considered in determining the amount of the proper award to be made." *State v. Northern Pac. Ry. Co.*, 88 Mont. 529, 295, P. 257, citing *City of Detroit v. Detroit United Ry. Co.*, 156 Mich. 106, 120 N. W. 600, and numerous other cases. See also the later Michigan case (1940) in re *City of Detroit*, 294 Mich. 569, 293 N. W. 755, citing 1 *Tiffany on Real Property*, 214, 35 C. J. 1120, that a tenant at will is entitled to compensation for the appropriation of his property.

• The fact that a lease contained a clause that the lessees would remove upon ten days' notice from the lessor was immaterial to the right of recovery and the condemnor acquired no right under this clause, no such notice having been given. *Shipley v. Pittsburg, C. & W. R. Co.*, 216 Pa. 512, 65 Atl. 1094.

"The right of the owner of the leasehold interest to compensation is not affected by any agreement made by the condemnor with the owner to pay him for the tenant's rights . . . nor is the right of a tenant to damages for injuries to a leasehold defeated by the fact that, under the lease, the owner may terminate the tenancy on short notice." 18 Am. Jur. Sec. 232, page 866.

"Indeed, when a piece of property which is subject to an ordinary lease for a short term is taken, it may happen that although the owner of the fee is allowed full value of the property, the tenant must also be paid a large and substantial amount in addition, by reason of the value of his lease." *Baltimore v. Latrobe*, 101 Md. 621, 61 Atl. 203.

"The owner of the leasehold and the owner of the reversion together hold the fee simple estate. Each has a dis-

inct estate or property. * * * Whatever be the method of ascertaining the values of these distinct interests, it is evident that the sum of those values must be the full value of the property taken (citing cases). As the owner of each separate interest has the constitutional right to be fully compensated before his estate can be lawfully taken for a public use, he is obviously entitled to look, not to someone else for that compensation, but to the agency authorized to make, and which actually does make, the appropriation of his property. He cannot be driven to seek redress from another. Hence, it will be no answer to his demand to say that the value of his interest, or of a part of his interest, has been improvidently awarded to someone else." *Glucke v. Mayor of Baltimore*, 81 Md. 315, 32 Atl. 515.

That we need not look to the landlord, but may have our interests separately determined has been approved by this Court from an early time. *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449. See also *A. W. Duckett & Co., vs. U. S.*, 266 U. S. 149, 69 L. Ed. 216.

"The right to compensation is to be determined by whether the condemnation has deprived the claimant of a valuable right rather than by whether his right can technically be called an 'estate' or interest in land." *United States v. 53 1/4 Acres of Land*, 139 Fed. (2d) 244, 247 (Second Circuit); *Brooklyn v. City of New York*, 139 Fed. (2d) 1007 (Second Circuit). These cases applied the law of New York in determining "compensable interest." The last case involved an agreement granting ten-year freight terminal rights for market places with option of renewal, which renewal right might be extinguished by notice. This was held to be a compensable interest in spite of the fact that it might be terminated upon notice. The right to terminate did not make the interest any less property.

but was held to be relevant in considering the question of compensation. This case infers that contracts may not be the subject of condemnation which is not in accord with the holding of this court. *Brooks-Scanlon Corporation v. United States*, 265 U. S. 106, 68 L. Ed. 934. *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 75 L. Ed. 473.

In *Sheehan v. City of Fall River*, 187 Mass. 356, 73, N. E. 544, the Supreme Court of Massachusetts held that a tenant at will could have maintained an action for any wrongful invasion of her premises or injury to her building while her possession continued. The nature of such tenancy might be considered as affecting the amount of an award, but not in determining property rights. "The settlement made with the landowner did not include her damages (the tenant's), for he asserted no title to the building, which could have been removed at any time before her estate terminated, and she is not precluded from recovery on the ground that it had become a part of the realty." The case held that the tenant at will had "a sufficient interest in real estate to enable her to maintain a petition under the terms of a statute broad enough to include compensation."

When the Government's contention that month-to-month tenancies are not property for which compensation must be paid when taken under condemnation is analyzed, its error becomes apparent. In these cases, for instance, the Government entered into a three months' renewable lease with the landlord. There is no reason why it could not have entered into a month-to-month renewable lease. It could condemn such a lease in the event the landlord refused to negotiate the same or a lease for any particular time for more or less than a month. It might then argue that such a lease had no value because it was so indefinite as to term or so short as to term that no value could be placed on it. It would argue that it had only dispossessed the landlord for

ten days, fifteen days, or a month, and that, therefore, any hardship or inconvenience he may have incurred in moving out of his property was only consequential; that he had his property back at the end of the time, and that since the Government had not taken any of his equipment or fixtures, there could be no recovery except for the time the premises were occupied, and since that time was so short as to have no market value, there need be no compensation. The Government confuses property with the determination of just compensation. Because the determination of just compensation requires the application of rules other than fair market value does not demonstrate that the thing taken is not property. "The constitutional provision (property) is addressed to every sort of interest the citizen may possess." *United States v. General Motors*, supra.

In the *General Motors* case, this Court points out the error of contentions such as made by the Government: "In any case where the Government may need private property, it can devise its condemnation so as to specify a term of a day, a month, or a year, with optional contingent renewal for indefinite periods, and with the certainty that it need pay the owner only the long-term rental rate of an unoccupied building for the short-term period, if the premises are already under lease, or if not, then a market rental for whatever minimum term it may choose to select, fixed according to the usual modes of arriving at rental rates."

In our cases, however, the Government is making a contention that has more far-reaching results than that. It contends that such tenancies are not property, and, therefore, instead of fixing any mode of arriving at rental rates it would pay nothing, because it argues that it has taken nothing and any harm to the property owner is "consequential." In the *General Motors* case this language answers the Government's contention: "If such a result

be sustained we can see no limit to utilization of such a device; and, if there is none, the Amendment's guarantee becomes, not one of just compensation for what is taken, but an instrument of confiscation." The Circuit Court said in its Opinion below: "The Government would in this case convert the Fifth Amendment from a guarantee of just compensation into an instrument of confiscation."

In our cases, the Government by its negotiated lease with the landlord, made unnecessary the valuation of the landlord's estate, to wit, the temporary use of the Terminal Building. There was no fund representing such value from which the tenants could be paid in accordance with the Government's contention. The Government, not the court or jury, fixed the owner's compensation, and while contending that we have no right to compensation, also asserts that our rights are to share in such a fund which, by its own action, is non-existent. As said by Mr. Justice Holmes in *Boston Chamber of Commerce v. Boston*, supra, "The statement of the contention seems to us to be enough."

(D) *A reference to the Independent Pneumatic Tool Co.*

Inasmuch as the Government contended that the Independent Pneumatic Tool Company had no lease (R. 485-487), and apparently the trial court and the Circuit Court adopted that contention, it comes too late now for it to change position and rely upon a release which it contended did not exist. However, later in this brief, in discussing the Government's arguments and cases, we shall present this matter further. For our present purposes it seems sufficient to assert that upon the face of it the condemnation provision in the Independent Pneumatic Tool Company lease has no bearing here. These proceedings terminated

the lease regardless of any of its terms so specifying. There was no taking of the landlord's estate by condemnation: there was no award to the landlord for his property. The tenant is asking for no part of the landlord's remuneration from the Government or for any adjustment of his rent. Nothing belonging to the landlord was taken by condemnation. The lease contemplated that the tenant should have nothing of the award to the landlord, and that the landlord should have no right to further rent from the tenant. The Government, however, is asking that the lease be construed to defeat the tenant's right to just compensation because of a provision that concerned only the landlord and the tenant. All that occurred here so far as the landlord was concerned was that the landlord has the United States as a tenant instead of the Independent Pneumatic Tool Company, not by condemnation but by a negotiated lease, after the Government had made such a lease possible by evicting the tenant under the power of eminent domain. The tenant did not contract in his lease to relieve the Government from paying him for loss suffered by him which was independent and entirely separate from the landlord. There was and could be no award to the landlord in our case, nothing in which the tenants could join, and this by reason of the Government's own act, and so the provision of the lease is inapplicable. The Government did not succeed to any of the landlord's rights in these proceedings.

We thus submit that as to each tenant its tenancy was private property at the time it was taken, when they were ousted from it, and possession was taken by the Government.

Point III.

RESPONDENTS' PROPERTY WAS TAKEN FOR PUBLIC USE.

(A). *The tenants neither asked nor received compensation for anything not taken.*

The Government confuses, as do many of the cases cited by it, the property taken with the evidence for determining compensation for it.

In the Circuit Court the Government contended at length that, "Neither the business nor the property which had to be moved by the tenants was taken." (Government's Brief, Page 21). There was no issue to the contrary. We have never contended that the Government took our business, our fixtures, or the property that was moved. We neither asked nor were we awarded compensation for any of those things. No evidence whatever was offered and it was stated at the outset that no claim was made for any loss of profit or loss of business. No attempt was made to recover the value of fixtures, business, or profits.

(B) *Consideration of what constitutes a taking of property.*

There may be a taking of property by an invasion, destruction or partial destruction without an actual physical appropriation. The deprivation of the former owner, rather than the interests acquired by the condemnor measure the taking. Governmental action, short of acquisition of title or occupancy, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, amounts to a taking. *United States v. General Motors*, *supra*.

"A right may be taken by simple destruction for public use." *Duckett v. United States*, 266 U. S. 149, 151, *supra*.

"While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. * * * The taking by condemnation of an interest less than the fee is familiar, in the law of

eminent domain." *United States v. Cress*, 243 U. S. 316, 328, 61 L. Ed. 746, 753.

"There is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water; * * * it is hard to see what more the government could do to take the use. * * * Our conclusion upon the whole matter is that the Government intended to take and did take the use of all the water power in the canal; (the use and occupation of the tenant's premises in the instant cases) that it relied upon and exercised its power of eminent domain to that end." *International Paper Company v. United States*, supra. (Pages 407, 408 of U. S. Reports).

"Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Chicago R. I. & P. R. Co. v. United States*, 284 U. S. 80, 96; 76 L. Ed. 177, 186 (1921).

"Acts of Congress are to be construed and applied in harmony with and not to thwart the Constitution." *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 491, supra. *Phelps v. United States*, 274 U. S. 341, 343, 344, 71 L. Ed. 1083, 1085.

"Plaintiff's consent was not sought; it was not consulted as to quantity, price, time or place of delivery. * * * Plaintiff's property was taken by eminent domain." *Liggett & M. Tobacco Company v. United States*, 274 U. S. 215, 220, 71 L. Ed. 1006, 1008.

So to the extent that the United States deprived us of the use of our property or by its acquisition, prevented us from using it, destroyed it or depreciated it in value, there was a taking. And for the property taken there must be paid just compensation.

(C). *The very act of asserting the power to condemn, recognizes both a property right and a taking, for which compensation must be paid.*

When the sovereign exercises the power of eminent domain and takes property under that power, it cannot claim that there is no compensation due. It is not within the province of the condemnor to say, "The property I have taken has no value." The very act of taking property by eminent domain establishes that it must be paid for and that it has a value. "But where, as in this case, the property owner resorts to the courts, as he may, to recover compensation for what actually has been taken, upon the principle that the government, by the very act of taking, impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require, * * *" *United States v. Cress*, supra, 243 U. S. 329.

"Moreover, it has long been established that, where, pursuant to an Act of Congress private property is taken for public use by officers or agents of the United States, the government is under an implied obligation to make just compensation. That implication being consistent with the constitutional duty of the government, as well as with common justice, the owner's claim is one arising out of the implied contract." *Phelps v. United States*, supra, 274 U. S. 343.

"Exercising by its authorized agent the power of eminent domain in taking the petitioner's property, the United States became bound to pay just compensation." *Russian Volunteer Fleet v. United States*, supra, 282 U. S. 489.

There having been a taking of our property by the power of eminent domain, the United States is bound to pay us just compensation.

Point IV.

FOR THEIR PROPERTY TAKEN BY THE GOVERNMENT FOR PUBLIC USE, THE RESPONDENTS ARE ENTITLED TO JUST COMPENSATION—THE VALUE OF THEIR TENANCIES OR RIGHTS OF OCCUPATION AT THE TIME THEY WERE TAKEN. MARKET VALUE AND JUST COMPENSATION ARE NOT ALWAYS SYNONYMOUS, PARTICULARLY IN DETERMINING THE VALUE OF LEASES. EVIDENCE ADMITTED IN THESE CASES, IS RELEVANT IN DETERMINING JUST COMPENSATION, EVEN UPON THE "MARKET VALUE" BASIS. THE VERDICT FOR THE TENANTS ARE NOT MORE THAN THEY WERE ENTITLED TO UNDER THE FIFTH AMENDMENT.

(A) *Courts construe the Fifth Amendment liberally in favor of citizens, and are watchful to see that technical rules and stealthy encroachments are not allowed to defeat the constitutional right to just compensation. It is no longer open to doubt that "market value," so-called, as defined in some cases where the fee is taken, is not synonymous with just compensation. "In the ordinary case, for want of a better standard, market value, so-called, is the criterion of that value. In some cases this criterion cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual value."*

Some of the cases, as did the Government in the Circuit Court, make the argument that, "The law charged the plaintiff with notice that it was subject to be deprived of the use of the leased premises by the exercise of the power of eminent domain." *Gershon Bros. Company v. United States*, 284 Fed. 849 (Government's Circuit Court Brief, Page 21), and from that premise build the argument that loss suffered by the condemnee is but an incident of his ownership of property which must be expected and borne by him as one subject to the will of the sovereign.

Also, some courts have denied recovery by misapplying the term "consequential damages" and defining losses as consequential damages, when in truth they are the direct and proximate result of the condemnation, and in no sense consequential. What might be classified as consequential damages in condemnation of the fee which has a market value cannot be classed as consequential damages in condemnation of the temporary use of property, real or personal, where there is no such so-called market value. In condemnation of the fee all of the elements which go into the making of value are considered in establishing the market value, and included in these elements are the uses to which the property is or may reasonably be put, the improvements upon it, its location, its suitability, its productivity, and every other element that goes to make it valuable. Thus there is justification in refusing to duplicate as separate elements things that have already been considered in determining market value. Such elements have been erroneously called "consequential" and rejected in determining "just compensation" where market value so-called is inappropriate as a rule of value. That such rejection is error is now established. The rules for the condemnation of the fee are only of general assistance in determining just compensation in cases such as are here under consideration.

Also, the above proposition, that an owner that is charged with notice that he is subject to be deprived of the use of his property by the exercise of the power of eminent domain is not accurate. There is no law that the property owner is charged with such notice, as if the Government possessed powers of confiscation to which the citizen must submit. The Fifth Amendment is not a grant to the sovereign to take property. That right is said to have been claimed by the sovereign from early times. The Fifth

Amendment, "Nor shall private property be taken for public use without just compensation," is a denial of the power of confiscation and is to be liberally construed in favor of the citizen. Occasionally courts and judges have also intimated that losses for which compensation must be paid under the Fifth Amendment and the rules for computing them, are matters for the legislature. This Court has held from an early time that those matters are not for legislative determination; that it would be unseemly to allow the legislative or political body that is condemning the property to fix or define the rules for determining the compensation that should be paid for that which it takes. The determination of just compensation is a judicial function, and in that determination, of course, must be considered the elements that go to comprise just compensation.

The citizen has no voice in when or where the power of eminent domain shall be exercised. The condemnor alone initiates condemnation proceedings. It selects what is to be taken, when it is to be taken, and the length of the period and the extent of the taking. It would be a complete frustration of the Fifth Amendment to allow the Government or Congress to say how much it shall pay for what it has taken; that it will pay for this but not for that. As well not have the Fifth Amendment if that were the law.

Many of the principles we have just recited are found in *Monongahela Navigation Company v. United States*, 148 U. S. 312, 37 L. Ed. 463 (1892).

In that case Congress authorized the condemnation of some locks and dams and expressly provided that nothing should be paid for the franchises. The argument was made to this Court that since the Government did not need the franchises, Congress having power itself to create any needed franchise, the franchises of the company need not be paid for. This Court repudiated the view and said,

(Page 327 U. S.), "It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be *the rule of compensation*. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." (Italics added).

Many of the erroneous theories of the Government and of some of the cases relied on by it are rejected in the *Monongahela* case, and we take the liberty of quoting it somewhat at length, since so far as we know, the principles therein announced have never been departed from by this Court and are quite appropriate herein:

"The question presented is not whether the United States has the power to condemn and appropriate this property of the *Monongahela* Company, for that is conceded, but how much it must pay as compensation therefor. Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the Government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.

"In the case of *Sinnickson v. Johnson*, 17 N. J. L. 129, 145, cited in the case of *Pumpelly v. Green Bay & M. Canal Co.*, 80 U. S. 13 Wall, 166, 178 (20: 557, 560).

it was said that 'this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.' And in *Gardner v. Newburgh*, 2 Johns. Ch. 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to everyone. It in nowise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

"But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmations lying behind it in the Declaration of Independence, for, in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses. And with respect to constitutional provisions of this nature it was well said by Mr. Justice Bradley, speaking for the court in *Boyd v. United States*, 116 U. S. 616, 635 (29: 746, 752). 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of

the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.

"The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire Amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being 'Nor shall private property be taken for public use without just compensation.' The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken."

* * * "And the question of just compensation is not determined by the value to the government which takes, but the value to the individual for whom the property is taken." (Page 343 U. S. Reports).

"The war or the conditions which followed it did not suspend or affect these provisions (the Fifth Amendment). The owner was entitled to the full money equivalent of the property taken, and thereby to be put in the same position pecuniarily as it would have occupied if its property had not been taken (citing authority). The ascertainment of compensation is a judicial function, and no power exists

in any other department of the government to declare what the compensation shall be, or to prescribe any binding rule in that regard. (Pages 343, 344). * * * The owner was entitled to what it lost by the taking." *United States v. New River Collieries Co.*, 262 U. S. 341, 343, 344, 345, 67 L. Ed. 1014, 1017, 1018.

"Any arrangements that the Government may have made with the owner to pay what might be due to the tenants, or some of them, did not affect the claimant's rights." *A. W. Duckett & Co. v. United States*, supra.

This Court has recognized that earlier cases sometimes construed the constitutional provisions within such narrow limits as to result in confiscation and inadequate compensation. *Jacobs v. United States*, 290 U. S. 13, 18, 78 L. Ed. 142, 144. "Suits brought to enforce the constitutional rights to just compensation are governed by the later decisions which are directly in point," and on Pages 16 and 17, "The suits were thus founded upon the Constitution of the United States. The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements. * * *

* * * "Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. * * *

"The compensation to which the owner is entitled is the full and perfect equivalent of the property taken (*Monongahela* case cited). It rests on equitable principles, and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken." *Seaboard Air Line R. Co. v. United States*, 261 U. S. 299, 304, 67 L. Ed. 664, 669.

(B) *Just compensation may be measured in other ways than by the fiction of a "market-value" that doesn't exist.*

In Brooks-Scanlon Corporation v. United States, 265 U. S. 106, 68 L. Ed. 934, the Court announced this rule as a proper measure in determining the value of the contracts which were expropriated: "That is, the sum that would, in all probability, result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy." (Page 124 of U. S.).

Many federal Circuit Courts and state courts of last resort have discussed the question of just compensation in connection with market value when applied to tenancies and other interests where the general rule of market value is difficult of application, and have indicated that the fact that a tenancy or other property taken by eminent domain may have no market value in the general sense of the term, does not deprive the tenant or the owner of the right to compensation. 18 Am. Jur., Sec. 296, Page 939; *United States v. Wheeler*, 66 Fed. (2d) 977, which was later referred to with approval in *United States v. Chicago B. & Q. R. Co.*, 82 Fed. (2d) 131, certiorari denied, 298 U. S. 690, 80 L. Ed. 1408; *Karlson v. United States*, 82 Fed. (2d) 330; also, *National Laboratory and Supply Company v. United States* (E. D. Pa. 1921), 275 Fed. 218; *Des Moines Wet Wash Laundry v. City of Des Moines* (1924), 197 Iowa 1082, 198 N. W. 486; three Pennsylvania cases, *James McMillin Printing Company v. Pittsburgh, C. & W. R. Co.*, 216 Pa. 504, 65 Atl. 1091; *Shipley et al., v. Pittsburg, C. & W. R. R. Co.*, 216 Pa. 512, 65 Atl. 1094; *Iron City Automobile Company v. Pittsburg*, 253 Pa. 478, 98 Atl. 679; *Blincoe v. Choctaw, O. & W. R. Co.*, 16 Okla. 286, 83 P. 903 (1905); *Bales v. Wichita Midland Valley R. Co.*, 92 Kan. 771, 141 P. 1009.

The court in the *McMillin Printing Company* case, *supra*, quoted in the *Iron City Automobile Company v. Pittsburg*, *supra*, on the general subject of market value with reference to the lease said:

"But market value is an unsatisfactory test of the value to a tenant of a leasehold interest. It is really no test at all, because a lease rarely has any market value. Generally, it is not assignable at the will of the tenant, and he pays in rent all that the right of occupation is worth. The right of which he is deprived, and for which he is entitled to full compensation, is the right to remain in undisturbed possession to the end of the term. The loss resulting from the deprivation of this right is what he is entitled to recover. The value of the right he is forced to sell cannot ordinarily be measured by its market price, for there is no market for it; nor can it always be measured by the difference between the rent reserved and the rental value, if the lease should be a favorable one. If, as was the case here, a tenant, engaged in a business requiring the use of heavy machinery and appliances, should secure a new place equally well adapted to his business, and at the same rent, he would still be at the expense of removal and at a loss because of the stoppage of his business. These are matters to be considered in connection with others, not as substantive elements of damage, but as tending to prove the value of the leasehold interest."

The Iowa Court discussed the same matter in *Des Moines Wet Wash Laundry* and both the Iowa and Pennsylvania Courts, as well as other courts, hold: "It is generally held in condemnation proceedings, the property being taken in invitum, that the controlling principle is analogous to a vendor and vendee and not between the landlord and the tenant." (*Des Moines Wet Wash*, *supra*, page 489 of N. W.). This thought is expressed as indicated above in the *Brooks-Seanlon* case and also in the *General Motors* case as follows: "2. Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction would be the reasonable cost of

moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. And it might also include the storage of goods against their sale or the cost of their return to the leased premises. Such items may be proved, not as independent items of damage, but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long-term lease.”

In the case of *De Laval Turbine Co. v. United States*, 284 U. S. 61, 76 L. Ed. 168 (1931), this Court had under consideration the cancellation of contracts requisitioned by the Government. In the Court of Claims, innumerable items were described as involved in the cancellation, including idleness of machines, operators and tools, drawings, moving of equipment, and the like. This did not present any insurmountable obstacle to the determination of just compensation; and in that case the company knew that the contract was subject to cancellation by the Government. The expenditures resulted from a temporary taking of the contract by the Government. This Court said that the cancellation was a “lawful act under the power of eminent domain.” The value of the contract at the time of its cancellation was allowed; “that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy. * * * The fact that the contract, if carried out, would be profitable is one of the circumstances which naturally would be considered by one seeking an assignment of the contract, and must be given its proper weight in fixing just compensation.”

The amount of a bonus a tenant is reasonably obliged to pay to obtain new space upon being compelled to remove

from his premises under the power of eminent domain as well as moving costs, is proper evidence to be proved in considering the value of the premises taken. *United States v. Katz Drug Co.*, 150 F(2d) Adv. Opin. No. 5, p. 681 (8th Circuit, 1945).

The foregoing authorities justify the conclusion of the Circuit Court in the case of *United States v. Wheeler*, *supra*, that for the road flooded which had no market value, it was not just compensation to pay only for the land actually flooded, but that the township must be made whole from money loss. "When the ordinary measure of loss (decrease in actual or assumed 'market value') cannot be applied, as here, then 'whatever is necessary to be considered in order to determine what is an equivalent for the appropriation of private property is germane to the question of compensation'." (Page 984)

And in the Chicago B. & Q. R. case, 82 Fed. (2d) 131, *supra*, the Eighth Circuit Court speaks of compensation as damage, as does the Monongahela case in this court, *supra*, at pages 136-137, as follows:

"Unless specific items of damage present here are compensable, then this case is wholly out of line with the principles of fair and just compensation laid down by this court and by the Supreme Court in cases too numerous to mention."

The court concludes, as it justly could from the citations we have already given, that to the word "taken" there must be added the words "or damaged" as follows: (Page 139)

"As already forecast, to the word 'taking' there has now been added by almost unanimous decision, bottomed on changes in the organic law, or by statutes, or by judicial interpretation in the later cases, the words 'or damaged.' This modern trend, which clearly

comports with fairness and justice, and without which that *just compensation* guaranteed by the Constitution cannot be accomplished, is plainly referred to and conceded by the Supreme Court in the very late case of *Jacobs v. United States*, 290 U. S. 13, wherein it is said: 'Suits brought to enforce the constitutional right to just compensation are *governed by the later decisions* which are directly in point.' " (Italics added).

That Circuit Court also holds that such items as were introduced in evidence in the cases at bar were not consequential damages, but are direct and proximate. And sometimes even when they are erroneously defined as consequential damages, they have been allowed. *Blincoe v. Choctaw*, supra.

The Eighth Circuit Court says in the *Chicago B. & Q. R. Co.* case, supra, at page 136:

"But obviously, confusion is found in the cases, and this confusion has seemingly misled learned counsel for appellant. This confusion comes, we think, from a failure to distinguish as to the origin of the independent cause. If the latter arises from the act of another person and so could have been obviated or prevented, or from natural causes acting abnormally, e. g. acts of God, damages arising from the original act are not recoverable, for they are consequential merely, and not proximate. *But if the hurtful result shall arise from the original act done, perforce, or plus the normal operation of well-known, uncontrollable and immutable laws of physics and natural forces, we are incapable of either following or agreeing to the distinction.*" (Italics added).

The Government is in error and it is a misnomer to designate such items as moving costs and the like as consequential damages. Here they are not consequential. But no effort was made to recover them as damages and the

verdicts do not cover them. While it may be that loss of profits and loss of business are too remote and thus consequential, we are not concerned with that question in these cases since there was no such evidence here. Even upon this question there is respectable authority that such matters as loss of business and loss of profits are sometimes relevant. "Loss of business profits as such is not allowable, * * * but in default of more direct evidence of sale value, present value (i. e. as of the time of taking) of clearly to-be-expected future earnings, may be considered." *Brooklyn Eastern Dist. Terminal v. New York*, 139 Fed. (2d), 1007, 1013. (Second Circuit Court of Appeals, January 6, 1944). We shall later comment on the Government's criticism of the Chicago B. & Q. R. Co. case at page 39 of its latest brief.

The Seventh Circuit Court of Appeals followed the Eighth Circuit Court, in the case of *United States v. Chicago B. & Q. R. Co.*, 90 Fed. (2d) 161, wherein the Government contended that it could be held liable only for that which it actually physically took, and that any other damage resulting from this taking was consequential. The Seventh Circuit Court, however, rejected the Government's contention and allowed recovery for damages which proximately resulted from the taking. * * * "we are convinced that all the damages covered by the verdict were proximate, and were not speculative, consequential, or remote." (Pages 168, 169). These damages included losses from backing up of water twenty-eight miles (Page 167) above the dam located on the land actually taken and necessitated the railroad raising and protecting its embankment and raising and extending its bridges and other matters similar to those occurring in the earlier case in the Eighth Circuit Court.

(C) *The trial court's instructions.*

In view of the novelty of the situation created in the present case, it is quite remarkable that the trial court instructed the jury as accurately as he did. Most, if not all, of the principles promulgated in the later cases, including the General Motors case, were covered by the trial court. The Government complains that the court left it to the jury to define "just compensation." This is an incorrect assertion. The court specifically called attention to all the elements present in the case, the character of the tenancies, the length of time tenants had occupied their premises, the kind of businesses conducted, what they had been required to do and expend as a result of being dispossessed, and told the jury that all these things should be taken into consideration. The court said, with reference to just compensation, "Those words are very broad in their meaning. The Constitution of the United States and the Amendments to it fortunately use words as a rule of general meaning.

"Now what is 'just compensation'? It cannot be defined by me, or any court, so that it would have anything like universal application. 'Just compensation' means speaking generally, that the owner who has been deprived of private property for public use by the Government shall be compensated in such measure that will constitute 'just compensation.' Not technical compensation, not compensation along any particular line limited or unlimited, but compensation." (R. 573).

The court also told the jury that the tenants might be better off in their new quarters than they were in their old. If they were they should get nothing in this case (R. 572-573). In fact, under the court's instructions and in view of the General Motors case, we were the ones who were injured and not the Government because, after allowing

all the evidence of our moving, increased rent, and loss, the court said with reference to these matters, "That cannot be the measure of the rights of recovery. That is not 'just compensation.' " R. 573).

The court specifically told the jury that the Government was not required to pay our rent for any definite period or the difference between our rent and the rent we were paying (R. 573). We never asked to have the Government pay our moving costs or our rent. We never asked for anything more than the value of our occupancy, and we didn't get that. The jury followed the court's instructions and the Government was the beneficiary. It is unfair to single out one particular phrase from the court's instructions and charge that the court left it to the jury to define just compensation. Even had he done so, there is authority to justify it. That is exactly what the Iowa court said in the Des Moines Wet Wash Laundry case, "The term 'just compensation' as found in Constitution and statute has no technical or purely legal significance. The words express in a general way the meaning intended." (Page 488).

The federal district court in *National Laboratory and Supply Co. v. United States*, 275 Fed. 218, supra, said the same thing: "These words have no technical or purely legal significance. What do they mean? They are in themselves expressive of the meaning intended."

(D) *Even under a "market value" measure the verdicts herein are not for more than the tenants were entitled to under the Fifth Amendment.*

When we read in some of the cases that the condemnée, in spite of the hardship to him, must bear the burden of loss actually suffered by him through the condemnation be-

cause of some supposed "rule," we may be certain that in those cases "just compensation" has been denied.

Some cases refer to ascertaining the value of the "unexpired term" of a lease. Our term was a legal occupancy with a right to stay indefinitely, subject to dispossession only by the landlord. To say that such an occupancy has no value because there is no unexpired term is just not true. It is disproved by the facts. There was an unexpired term which was taken. We had been given no notice to vacate. The landlord wanted the tenants to stay and the tenants wanted to stay. Their businesses were built up without leases around this location for from fourteen to twenty-six years. It is proper here to measure the future by the past. We all had unexpired terms which were taken. We also had a present right of occupancy which was destroyed and taken.

There really is no difficulty in ascertaining just compensation in our situation or in any situation we have encountered in an examination of the cases. Using the tests announced, it seems to us that we might even adopt the "market value" fiction. A person desiring to occupy the Grocer Printing Company premises and willing to pay Mr. Grimsdell to vacate would be Mr. Grimsdell's market, even though he was the only person to entertain such a desire. A vendor and vendee discussing the purchase of such an occupancy would do exactly as indicated by this court in the General Motors case. The prospective purchaser would be willing and desirous of taking the premises, and Mr. Grimsdell would be willing, upon being fairly compensated, to vacate. The only question remaining would be what would reasonably enter into such a transaction. The purchaser knows that there is no lease, but that the landlord is willing for him to move in and occupy the premises, to stay and to establish his business there. He knows that Mr. Grimsdell

must find another location. If the rent is higher, the location less desirable, the heat and light additional charges, those matters would all be considered. The purchaser would take into consideration Mr. Grimsdell's facilities and equipment and would realize that they had to be moved. The reasonable cost of moving them and reestablishing them would be considered. Mr. Grimsdell's occupancy being terminated, there would be no consideration for any other costs than moving him and establishing him in his new location. If some of his property was damaged or depreciated by the removal, that would be considered. None of these items in and of themselves would constitute just compensation, but all of them are relevant in placing a value upon the occupancy. Reasonable men in making a deal for one to vacate so that the other could occupy the property, would naturally and logically take into consideration what the mover would lose in the transaction, what his damage would be, and would consider a sum which would restore him the money lost in consequence of his property being vacated. All of these matters would be taken into consideration by the purchaser in fixing the value of Mr. Grimsdell's interest in the property.

This Court in the General Motors case says, "In the light of these principles it has been held that the compensation to be paid is the value of the interest taken. Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken." The interest taken is the occupancy. To put Mr. Grimsdell in as good position pecuniarily as he would have occupied had his property not been taken would require taking into consideration those items of cost and expense that necessarily and proximately result from the taking. The owner's out-of-pocket expense in vacating, reestablishing himself, his increased cost of doing business, if any, and all matters rele-

vant to determining the cost to him resulting directly and proximately from the taking, are matters that can readily be ascertained.

It is quite impossible to enumerate exactly what the items would be in every instance, but they can readily be ascertained in every case by an adequate and proper investigation. That is one reason why the ascertainment of those things should be a judicial question, a question for a court hearing the specific items of evidence in each separate case, rather than a legislative question where the legislature would have to speculate in advance on theoretical hypotheses that might or might not exist.

In a long-term tenancy where a short-term is carved out of it, if the tenancy was not terminated by the condemnation, of course, the relocating of the tenant after the termination of the short-term condemnation would naturally be considered in a deal between vendor and vendee or two fair-minded individuals bargaining for such an occupancy. If the tenant was under no obligation to return and did not desire to do so, then, of course, the relocating expenses would not enter into just compensation. In the cases at bar, it was assumed that none of the tenants would return to these premises, and consequently, no evidence was offered of anything except their costs of removal and re-establishment, and that evidence only for the purpose of determining the value of their occupancy.

The owner, however, Mr. Richards, had his case gone to a jury and a lease not been negotiated would have been in an entirely different position. The Government has completely altered the interior of his building. Certainly he would be entitled to have his premises restored to their original condition, if he desires. If he does not, it would be easy enough for him to so say in the condemnation trial, and that matter can be properly considered and determined there.

It is not for the Government to say, "You must take your premises back in such a condition as we desire to return them." The Government would have been required to put Mr. Richards in as good position financially as he would have been had his premises not been taken. That would require not only the payment of the rental for the space actually occupied, because occupying space even though unoccupied before is a taking of it, but would require some consideration for the restoration of his property and the damage he sustains from the loss of tenants who are not going to return.

Because in a given case determining just compensation may involve many considerations does not excuse the Government from making compensation. The Government has the choice of condemning the whole or any part, of fixing the term of its occupancy, of determining the manner of its procedure. The tenant and owner have no voice in these things. And having made its election of procedure, term of occupation, and interest to be taken, the Government cannot be allowed to escape paying just compensation upon the plea that it has created a condition that requires the application of rules of evidence different than required in the condemnation of the fee. In fact, in condemning the fee, all matters of value would be considered, not the bare value of so many square feet or so many acres of vacant ground, but the value of the ground, taking into consideration its use, its location, its reasonable future use, the business being conducted, the buildings, and all the other matters that enter into consideration in fixing value between a fair purchaser and a fair seller.

Congress did not authorize the Government to go about the country throwing people out of their premises without compensation to those dispossessed. If the exigencies of war prevented a proper consideration of what should be

done and required such expedition as to admit of no adequate investigation and negotiation, Congress took care of that situation by authorizing the condemnation of anything necessary, and knew by granting that authority, that the citizen was protected because the exercise of the power of condemnation requires the payment of just compensation. The very fact that the Government chose eminent domain as the means of acquiring property forecloses the Government from arguing that it need not pay for it. By choosing condemnation, the Government admits that the thing taken is property for which it is required to pay the condemnee what he loses by the taking measured by standards that can readily be applied.

In our cases we have been paid nothing, offered nothing. We have never even been considered. This Court has never authorized or sanctioned such a course of procedure. Evidence received in these cases was competent and relevant in determining the value of the tenancies, although the jury under the trial court's instructions disregarded much of it. The verdicts do not award more than just compensation.

The *General Motors* case does follow basic principles of a long line of decisions of this Court. The trial court was guided by these principles and we submit correctly applied them to the facts herein. This Court from early times has consistently upheld the rights of citizens under the Fifth Amendment. It seems to us the Circuit Court was right in believing that "the basic principles announced in the *General Motors* case are not confined to the narrow facts involved therein. We are convinced that the principles announced therein are controlling under the facts as presented here. Otherwise, the Government would in this case convert the Fifth Amendment from a guarantee of just compensation into an instrument of confiscation."

GOVERNMENT'S BRIEF

We have read all the cases cited by the Government in its brief on Petition for Certiorari, and most of those in the latest brief. A large number of them are decisions of trial courts and of foreign jurisdictions, which are hardly authoritative on the United States Constitution. It seems to us the trial court in our present cases gave effect to the protection of the Fifth Amendment so as to accomplish its purposes, and that some trial courts cited by the Government did not comprehend the scope of its guarantees. Not one case cited by the Government would justify a reversal of the cases at bar. Our cases are essentially different in their facts. Many of the Government's cases may not be considered since they are in conflict with applicable decisions of this Court. Many of them are also against the Government's claims here. It is not feasible within the limits of a brief to discuss them all, but we shall later make specific reference to some of them.

The Government presents two questions:

"1. Whether tenants occupying property condemned by the United States for temporary use for a period longer than the tenants' existing leases are entitled to prove moving costs and consequential damages resulting from the enforced removal as evidence of the value of their interests.

"2. Whether month-to-month tenants are entitled, upon condemnation of the leased property by the United States, to compensation based upon such indefinite period of time as the jury should conclude the tenants might have continued to occupy the property."

We believe that neither question accurately propounds propositions present in our cases.

Government Question I

The building the tenants were occupying was not condemned by the United States for temporary use; it was not condemned by the United States at all. Our premises were not condemned for a period longer than any of our existing leases. We did not offer to prove any consequential damages, nor was any evidence received of consequential damages in the sense that that term may be accurately applied in these cases. What the United States did was to evict us by an order to show cause under a petition that requested a seven and one-half months' renewable lease. Every one of us could have and would have remained in the property much longer than that. The Government never completed those proceedings. After it evicted us it actually entered into a negotiated three-month renewable lease for the building. Its theory advanced at the trial and in the Circuit Court, and apparently abandoned in this Court, that all it had to do was to find the value of the landlord's interest, pay that into court, and that ended its responsibility in the matter, was obviously inapplicable to the facts in our cases. The value of the landlord's interest had nothing to do with us. Nothing was taken from him. He and the Government fixed his compensation. That would not bind us, we were not parties to it. It would not determine the value of our occupancy to determine what was a reasonable monthly rental the landlord should receive for the empty Terminal Building. As a matter of fact, the Government misstates the rule. In those instances where the value of the premises taken was fixed as a whole for division among the several interests, the value of the landlord's interest and the tenants' interests were separately computed and the whole comprised the value of the property taken. This is demonstrated in cases cited by the Government itself. For example, in the

case of *Süberman v. the United States*, 131 Fed. (2d), 715, the Circuit Court expressly held that a tenant had a right to be heard; that he had a right to compensation for his interest, but since the lessee had not been substantially prejudiced by being refused permission to appear and offer evidence the case would not be reversed. It was not necessary to reverse the case because the award was sufficient to cover the tenant's interest, and if payment of the tenant's interest did not leave enough also to pay the landlord, that was the landlord's fault for not offering evidence of the value of both interests.

In our cases, not only did we not know how long the Government would be in possession of the landlord's building, we did not know whether it intended to restore the building or whether the landlord wanted it restored. In fact, we knew nothing about the landlord's ideas or status. He had no reason to offer any evidence. He was out of the case. The Government put the landlord out of the case by making a lease with him; and thus made moot the value of the landlord's interest. The Government cannot defeat our recovery by making a lease with the landlord.

In one of the cases cited by the Government, *United States v. Inlots*, 26 Fed. Cases, No. 15441A, Page 492, one of the tenants appealed to this court, the appeal being *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449, *supra*, and this court approved the determination of the landlord's and the lessee's interests separately. The jury found and returned separate values of the estates of the lessor and the lessee. The estates of the landlord and the lessee here were determined separately, one by negotiation and the other by a jury. The Government's Question I is irrelevant here.

Government Question II.

The Government's second question again assumes that there was condemnation of the leased property unless by the term "leased property" it means our tenancies. If it means our tenancies, then the Government's own use of language answers its own question. By using the phrase "condemnation of the leased property by the United States," the Government concedes that we had leases which were condemned. A lease is property, and, of course, it must be property or there would be no need to condemn it. Having selected and used the method of condemnation to secure the property, there arises an absolute obligation to pay just compensation. The jury were not left to fix compensation based upon such indefinite period of time as the jury should conclude the tenants might continue to occupy the property. The Court instructed the jury in positive, definite language (R. 569-574). It is not fair to single out a phrase or a sentence and hold that up as the sum total of the Court's instructions, which in their entirety convey a meaning entirely opposite than that attributed to them by the Government. The Government has offered, and at the trial did not offer, any instructions it considers proper. It would be interesting to have the Government propose for analysis instructions herein that it would consider proper and specify under which of its many theories. When all of the instructions are read as a whole, it is evident that the Government was not injured by them.

GOVERNMENT'S ARGUMENT I. (Page 15)

"THE TENANTS IN THIS CASE WERE NOT ENTITLED TO PROVE EXPENSES INCURRED AS A RESULT OF BEING REQUIRED TO MOVE OUT OF PREMISES CONDEMNED BY THE GOVERNMENT AS EVIDENCE OF THE VALUE OF THEIR TENANCIES.

"(A) The expenses incurred by a tenant in moving removable fixtures and personal property from premises

condemned is not to be considered in determining just compensation when the tenant's entire interest in the property is taken." (The foregoing are the Government's statements.)

Under this heading the Government still argues that it condemned the Old Terminal Building for a period expiring June 30, 1945, which it did not. It also admits that throughout the case it objected to consideration of moving expenses for *any purpose* (P.15). This objection was also invalid. The Government says that the Circuit Court conceded that "the lease acquired by the government was for a term extending beyond the expiration of the lease owned by each of the tenants, with the exception of the lease owned by the Independent Pneumatic Tool Company, and possibly with the exception of the lease owned by the Petty Motor Company." (Government's Brief 15). That quotation from the Circuit Court's Opinion is the statement by the Circuit Court of the Government's contention, the same there as here. The Circuit Court did not agree with it. The Circuit Court said in answering this contention, "The basic principles announced by the General Motors case are not confined to the narrow facts involved therein." The term of the lease acquired by the Government did not extend beyond the expiration of the leases of any of the tenants.

At pages 16 and 17 of its brief, the Government apparently argues that the *General Motors* case announced principles that are exceptions to and different from principles formerly established by this Court. We do not understand that the General Motors case holds that just compensation is different in one class of condemnations from just compensation in another class of condemnations. Nor do we believe as the Government contends at another place

in its brief (Page 30) that there is "an exceptional measure of compensation" in railroad cases as distinguished from any other cases. As we read the decisions of this Court, including the *General Motors* case, the Court long ago interpreted the Fifth Amendment as it should be and must be interpreted. In the *General Motors* case it simply applied those principles, which the Circuit Court herein said are basic, to the facts in that case. Obviously where there is no market value for property taken under eminent domain, it is impossible to apply the market value rule. That fact, however, does not require the abandonment of the Fifth Amendment and a denial of compensation to the person whose property is taken. Nor is compensation denied in such cases because this Court in other cases where it was possible to do so has applied the market value theory. This Court has always said the Fifth Amendment *must* be enforced. And since the Fifth Amendment *requires* compensation to be paid, this Court from time to time has announced applicable-rules for determining just compensation.

We do not understand the *General Motors* case to hold that if the Government had taken the entire term of the General Motors the company would thereby be precluded from offering evidence of its expenditures and moving costs as evidence of the value of its lease. Had the entire term of the General Motors been taken, it would have been deprived of the right to occupy the premises as it had improved them for its occupancy; the time of its moving would be accelerated, not by virtue of the expiration of its lease, but solely by the exercise of the power of eminent domain. Because the landlord could require the General Motors to vacate at the expiration of its term, does not give a condemnor or anyone else the bare right to require it to move before the expiration of that term.

The argument that the tenant had to move anyway at the conclusion of its term, and thus cannot have its moving costs considered in valuing its term merely because it has been required to move earlier and thus incur only the same expense it would later be required to pay, overlooks the fact that the earlier removal is required under and only by the power of eminent domain. Because the entire term is taken of a lease of property specially equipped by and for the lessee, which consequently would generally eliminate a market value for it, should not thereby deprive the lessee of the right to have considered in fixing the value of its tenancy the elements that go into the making of that tenancy valuable. Certainly the cost of moving out and re-establishing would enter into any fair negotiation between a vendor and a vendee whether the term "taken" was for the entire term of the lease or merely for just a part of it. If it were otherwise, the condemnor could fix the amount recoverable almost at will. This the Court pointed that out in the *General Motors* decision and said:

"If such a result be sustained we can see no limit to utilization of such a device; and, if there is none, the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing 'just compensation' * * *."

There is no attempt to secure refunding of moving costs or the value of fixtures and like items, but merely a consideration of these things in determining the value of the tenancy for which there is no other method of fixing value.

So, we do not understand the *General Motors* case to hold that the Government by fixing the term of its occupation either beyond or less than the term of the lease condemned can deprive the owner of just compensation for that which is taken from him. And, obviously, where there is no established market value, as there is not in

thousands of instances where property is specially equipped or located for the tenant's particular business, the cost of moving out and re-establishing are elements any fair-minded man would consider in fixing the value of the tenancy. The condemnor selects the object of the condemnation, has the right to take it or leave it and knows in advance the accompanying requirements as to compensation. No advantage is taken of the condemnor and no harm is done him, since he knows before he takes the property the matters that will be considered in fixing compensation for that which is taken. Congress recognized that it might be more economical to purchase property for temporary occupation than to condemn it (footnote 16, page 32, Government's brief), and never intended that because business concerns occupied their premises under short or long term leases they were to be called upon to bear alone the burden of loss that should be borne by the entire public because it would be difficult if not impossible to determine just compensation without considering removal and re-establishment costs.

B. (Page 17) "Even a tenant whose entire interest is not taken when the Government condemns property for a temporary term cannot have consequential damages other than moving expenses resulting from the taking considered for any purpose." Under this heading at page 17 the Government asserts that the court below held that whenever less than fee simple title is condemned the rule denying recovery of consequential damages does not apply. We find no such holding in either of the lower courts. Consequential damages were not considered in our cases. Under the same heading and also under the same subdivision of its Summary of the Argument, page 11, the Government points to the fact that the lower court received evidence concerning the tenants' unwillingness to move. The evidence of the tenants' unwillingness to move was offered

only for the purpose of showing that their occupancy was not temporary or transient, and not for the purpose of having that matter enter into the valuation of the tenancies. On pages 12 and 18, the Government classifies consequential damages as loss of good will and injury to business. Both were excluded from our cases. We do not know why the Government makes in the same category the constant reference to consequential damages and impropriety of proof of good will and injury to business in its complaints against the lower courts, since no scintilla of evidence of loss of good will or injury to business was received or considered in these cases. Throughout its entire brief, the Government reiterates its reference to consequential damages, the evidence of increased rents, and the like, with never a word concerning the Court's instructions to the jury, particularly the express statement that the jury were not required to award increased rents, moving costs and the like because that was not just compensation.

On page 19 the Government inferentially charges that evidence of reduced net profits, because of increased overhead expenses, was considered in this case, and that the trial Court instructed the jury that the question was as to whether the tenants were better or worse off in their new quarters. Both charges are wrong. The Court specifically said from the beginning that just compensation was not to be determined by the cost of moving, the extra rent, and the like, and in his instructions to the jury expressly said that the tenants might be better off in their new quarters, and if they were they could recover nothing (R. 572, 573).

The Government cites numerous cases under subheadings A and B of its Argument No. 1. A detailed discussion of them is obviously impossible in this brief, but a random selection of almost any of them will indicate that

they do not support *any* contention made by the Government herein. For example: *Mitchell v. United States*, 267 U. S. 341, 69 L. Ed. 644, is not limited by the decision in the *General Motors* case. The *Mitchell* case involved the taking of the fee. The Government was asked to pay for destroying a business. We made no such request, and none of the questions involved in the *Mitchell* case are involved here. In that case, however, it was declared that in fixing value it was proper to consider the special value and adaptability of the land and the particular business conducted thereon by the owner. Thus were included the very elements that were also considered in our case in fixing the value of our premises.

In *United States v. Miller*, 317 U. S. 369, 87 L. Ed. 251, 254-5, the Government leaves out this quotation from that case, "Where, for any reason, property has no market resort must be had to other data to ascertain its value."

Joslin Co. v. Providence, 262 U. S. 668, 67 L. Ed. 1167, involved only the constitutionality of a Rhode Island statute which expressly required payment of moving costs within a certain area. The contention was made that the statute was unconstitutional, and this Court held that it was not. In that case the Legislature, instead of attempting to *limit* the amount of just compensation, made it clear that it intended that just compensation should *include* moving costs. There is nothing in that case contrary to the decision of the Circuit Court herein.

Omnia Co. v. United States, 261 U. S. 502, 67 L. Ed. 773, is authority for the proposition that an executory contract for steel was not taken by the Government upon requisition of the steel company's entire production. That case has no bearing upon our cases. We did not ask for anything for loss of contracts.

In the case of *Bothwell v. United States*, 254 U. S. 231, 65 L. Ed. 238, the trial Court allowed the claim for hay, but denied the claim for destruction of business and depreciation of cattle where the fee of lands was condemned. The value of the property, however, was fixed with consideration of the kind of a business being carried on upon it.

On page 20 of its brief, the Government cites some 24 cases as authority for the proposition that items considered in the *General Motors* case had theretofore been held inadmissible as being speculative and consequential in nature and having no bearing on market value. While the *General Motors* case calls attention to the fact that in the condemnation of the fee certain elements are not considered in fixing compensation, it must also be remembered that in arriving at just compensation where the fee is taken, every element that properly goes into a consideration of value is received, such as the use being made of the property, the highest use that can reasonably be made of it, the improvements on it, its location, its adaptability for particular uses, any special value it has, and all elements that go into a fair valuation; also included is damage, depreciation and destruction of other property necessarily incurred in connection with the property taken. That is to say, in the condemnation of the fee, the courts have arrived at a formula that can be followed in most instances in arriving at a proper value. It is not necessary to depart from that formula in most cases. However, this Court has also recognized that even in some fee condemnation cases it may not be possible to apply that general formula, and "where, for any reason, property has no market resort must be had to other data to ascertain its value; and even in the ordinary case, assessment of market value involves the use of assumptions which make it unlikely that the appraisal will reflect true value with nicety." *United States v. Miller*, supra. So, in the *General Motors* case,

and other cases not involving the condemnation of the fee, questions arise which are not present when the fee is taken. In other words, it is proper to consider in such cases elements that it is not necessary to consider where the fee is condemned. And even in fee condemnation, where market value is not applicable, whatever is *necessary* may be considered in order to determine what is equivalent for the appropriation of private property. Because this Court in the *General Motors* case said that it did not desire to depart from the established rule in cases where the fee is taken, does not justify the assumption that a different rule applies in cases of condemnation of leases. As we read the *General Motors* case, it holds that there are elements involved in lease condemnations that are not involved in fee condemnations, and consequently a different method may be used to determine the same result—just compensation. The evidence of moving costs and the like is not received as an item of damage or cost which the Government must repay, but only as an aid in arriving at the value of the thing taken. Usually in fee condemnations it is not necessary to receive such evidence in order to determine the value of the fee. In some of the cases cited by the Government, the attempt was made to offer evidence of loss of business profits and the like in connection with the condemnation of the fee in order to secure *payment* for these items, *in addition* to the value of the land taken. Such evidence for such purposes would be inadmissible in cases involving leases. In condemnation of leases, evidence of moving costs, destruction and depreciation of fixtures and other personal property is not received in order that those costs may be repaid, or paid in addition to the value of the property taken, but in order to aid in determining the value of the lease. In the end it comes to the same thing, whether a fee or a lease is concerned: the effort is to formulate methods for determining the value, and if the

so-called "market value" theory is not applicable then the condemnee is not denied compensation, but *another* formula is adopted to determine value. We have yet to have pointed out to us *anything* in our cases that was offered in evidence that would not fairly be considered in fixing the value of our lease in a fair transaction between a willing vendor and a willing vendee.

As we read them, the great majority of the cases cited by the Government on page 20 have no application to the facts in our cases. Of course, those like *Gereshon Bros. Co. v. United States*, 284 Fed. 849, are directly contrary to the *General Motors* case; while others announce principles supporting our views here and against those advanced by the Government. Examples of such cases are:

Pacific Livestock Co. v. Warm Springs Irrigation Dist., 270 Fed. 555, wherein the 9th Circuit Court said at page 559: "There may be circumstances under which the expense of removing personal property from land which is sought to be condemned is a legitimate item of damages. But the damages here sought to be recovered on account of the hay were too conjectural and uncertain to form the basis of recovery at the time of the judgment of condemnation."

In *Futrovsky v. United States*, 66 Fed. (2d) 215, the Court said the record was "insufficient to properly present the questions raised." It called attention to the fact, however, that the owner had been allowed to offer all the evidence he desired concerning his property specially equipped for refrigeration purposes, the installation, metal and cement that went into the room, "which evidence indicated a net reproduction cost of \$4,666, which went to the jury along with the other evidence, and which must be taken as having duly entered into their verdict as rendered."

In *Re Widening Third Street in St. Paul*, 176 Minn. 389, 223 N. W. 458, the Court calls attention to the fact that condemnation is similar to a transaction between private parties: if the private party receives full value for his property he removes at his own expense. It follows that if it is necessary to figure the cost of removal in order to determine the value of the property, the owner still pays his own cost of removing, and that cost is only one of the elements to be considered in determining the value of the property. It is not added to the value of the property, but is merely a guide to determine what is that value.

The two Missouri cases indicate some uncertainty as to what exactly is the rule in Missouri. For instance, *Springfield S. W. R. Co. v. Schweitzer*, 173 Mo. App. 650, 158 S. W. 1058, cites other Missouri cases where removal costs were allowed; and in *St. Louis v. St. Louis I. M. & S. R. Co.*, 266 Mo. 694, 482 S. W. 750, the Court concludes that there should be deducted from the market value of fixtures removed the amount by which they are diminished by the necessity of removal and installation elsewhere.

The cases cited by the Government on page 22 of its brief are not in point, since the trial court did not disregard the standard of a willing seller and substitute for it a personal standard of value. The Government apparently believes that to the words "willing seller" should be added "at whatever price the buyer wants to pay." The test is a willing seller and a willing buyer in a fair transaction, "taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining" also if market value "is lacking, the market value must be estimated." *Olsen vs. United States*, 292 U. S. 246, 257, 78 L. Ed. 1236. (Partially quoted pp. 21 and 22). It is not a question of whether one wants

to sell or whether one *wants* to buy. If a person *wants* to sell, the question of how much he will sell for depends upon how badly he wants to sell; and the same is true as to the use of the word "want" in connection with the buyer.

Under subdivision C, pp. 23-28, the Government devotes itself to the Independent Pneumatic Tool Company lease. Of the cases cited by the Government in its brief, almost half of them are cited in connection with this one tenant. This company actually spent \$615.58 in improvements in its premises in the Terminal Building, all of which it lost upon removal (R. 199, 207). This sum is wholly apart from the moving costs from the Terminal Building. These expenditures have nothing to do with the landlord and were no part of his allowance from the Government. The verdict for this company was \$600.00, and in view of the factual situation here, hardly justifies the prominence it receives in the Government's brief. Under the facts here the case is not a precedent. None of the cases cited by the government has a similar factual record. We do not know whether the Government has abandoned its position regarding this tenant in view of this footnote on page 12 of certiorari brief. "In view of the fact that the settlement made with the landlord in the instant case did not require the owner to indemnify the Government from the claims of lessees (citing a case), the United States does not deny that it is primarily liable to the tenants." See also footnote 11, page 27, of latest brief.

However, we have read all of the cases cited. None of them is controlling. Nine of them are decisions of trial courts; two citations are the same case in different courts. As conceded by the Government, footnote page 12, certiorari brief, many of the cases arose on apportionment of the total award for the property between the owner and his tenant. Also, in most of the cases the entire fee of the landlord was condemned.

In one case the trial court held (*United States v. Certain Parcels of Land in Loyalsock, Township, etc.*, 51 Fed. Supp. 811) that condemnation was the same as a sale. In *Liggett & M. Tobacco Co. v. United States*, 274 U. S. 215, 71 L. Ed. 1006, supra, this Court held that the requisitioning of the property of Liggett & Meyers was not a sale. "Navy order N-4128 did not purport to be an offer to purchase. It commanded delivery of specified merchandise. Plaintiff's consent was not sought; it was not consulted as to quantity, price, time or place of delivery. The Navy relied upon the compulsory provisions of the Acts of Congress and commanded compliance with the order. * * *

"The findings show that plaintiff's property was taken by eminent domain," * * * (Page 220 of U. S.).

In some of the cases, the tenants had agreed that the fixtures should be the property of the landlord. One case (*U. S. v. Certain Improved Premises*, 54 F. Supp. 469), held that in no event could removal expenses be considered, on the authority of the Gershon case, 284 Fed 489, relied upon by the Government in the Circuit Court in our cases, but not adopted by this Court in the General Motors case.

In another case, *United States v. 21,815 Square Feet of Land, etc.*, 59 Fed., Supp. 219, the trial court declared that the tenant was chargeable with knowledge that his property could be condemned as though condemnation were confiscation. Instead of construing the Fifth Amendment liberally to protect the citizen, the court construed it liberally to protect the Government. The court held that the General Motors case did not apply because in the condemnation clause of the lease, it provided that the fixtures belonged to the landlord on condemnation. There is no such provision here.

In some of the cases, for instance *Boston v. Talbot*, 206 Mass. 82, 91 N. E. 1014, the lessors actually terminated the

lease by notice. In the *American Creameries* case, 149 Washington, 690, 271 Pac. 896, after condemnation was commenced by the City of Seattle, the landlord agreed what the amount of its award should be. There was a provision in the lease to the plaintiff that its tenancy should terminate upon a sale. The Supreme Court of Washington said, "There is but one question for determination in this case, namely, when the City of Seattle took the property by condemnation proceedings did the transaction amount to a sale of the property within the terms of the lease between respondent and the appellant?" The tenant was also insisting upon recovering a part of the landlord's award. Condemnation is not a sale, and we are seeking no part of the money paid the landlord by the Government.

In *Goodyear Shop Machinery Company v. Boston Terminal Company*, 176 Mass. 115, 57 N. E. 214, the condemnor was also the landlord and gave notice of the termination of the tenant's lease which was terminable upon condemnation. The question was whether the landlord, being also the condemnor, had not violated the covenant for quiet enjoyment. The court, however, said that the lease gave the lessor the option to terminate on condemnation, and the mere fact that the landlord was also the condemnor did not give the tenant any additional rights.

In our cases, had the proceedings continued to condemnation against the landlord for the same lease as was negotiated, it would require some ingenuity to define what had been condemned. Certainly the fee was not taken nor was the entire property. The landlord gets his building back and eventually will have all of his property left so neither he nor the tenants could insist on the entire value of the property being determined. "Where the owner, after condemnation, retains substantial rights in the property, he cannot insist on their value being included in the measure

of his compensation." *Karlson v. United States*, 82 Fed. (2d) 330, 336. Nor can the tenants be required to wait for their compensation where the landlord gets his month by month. "The value of the leasehold should be fixed as the date of the award. The award cannot be suspended in thin air awaiting the future contingency of when the Government may see fit to occupy its property for the purpose for which it was taken in condemnation. (Or the future contingency of the Government electing to abandon or to continue its lease and monthly rental payments.) * * * He did not contract with the Government and possibly might not choose the United States as an agreeable landlord." *Carlock v. United States*, 53 Fed. (2d), 927, cited and relied upon by the Government. The Carlock case also says: "We are not impressed with the contention of counsel for the Government to the effect that the tenant is not entitled to any consideration or remuneration for the improvements which he placed upon the premises."

When the reason for the insertion of condemnation clauses in leases is considered, the inapplicability of the clause to our case is apparent. 'Some courts have held that the condemnation of the entire property terminates the lease and all obligations under it, while other courts hold that it does not. (See *Goodyear Shoe Machinery Company v. Boston*, supra.) *City of Pasadena v. Porter*, 201 Calif. 381, 257 Pac. 526; *Foote v. Cincinnati*, 11 Ohio, 408; *Pause v. City of Atlanta*, 98 Ga. 92, 58 Am. St. Rep. 290. Some courts hold that a partial taking does not abrogate the lease and the tenant is bound to continue paying rent. *Corrigan v. City of Chicago*, 144 Illinois 537, 543, 33 N. E. 746; *Stubbings v. Village of Evanston*, 136 Illinois 37, 26 N. E. 577; *Pierson v. H. R. Leonard Furniture Co.*, 268 Michigan 507, 256 N. W. 529. The condemnation provision in leases is designed to eliminate this uncertainty and definitely to define the rights of the tenant as well as of the landlord.

The tenant is relieved of paying any further rent for any of the premises and the whole matter between the landlord and tenant is concluded. The tenant, as a consideration for such a release, agrees not to claim any of the award of the landlord. There is nothing in such a clause that relieves the condemnor of any liability. It is not a party to it, nor was it made for its benefit.

In the case of the Independent Pneumatic Tool Company, its tenancy terminated by the condemnation regardless of anything contained in the lease. It was the tenant's right of occupation that was taken, not the landlord's. The landlord lost nothing. He was not entitled to possession, but only to his rent, which he is receiving now from the Government instead of from the tenant. The tenant is the only one whose property was taken. He was ousted completely, and is seeking nothing from the landlord. The landlord was awarded nothing, is being paid nothing, nor could he receive anything for the property taken from the tenant. The condemnation provision of the lease, being solely for the benefit of the landlord and the tenant, would have no bearing upon the tenant's right to recover for damages peculiarly applicable to him and which in no way diminish the award of the landlord. The condemnation provision was not made for the benefit of the condemnor, and it is difficult to understand how the condemnor may use it as a defense against paying just compensation when it takes property of the tenant that is entirely distinct and separate from that of the landlord. Some of the cases cited by the Government allowed recovery for the tenant's fixtures or for damages thereto. Under the facts and verdict here we submit both lower courts disposed of the Tool Company case properly, particularly since at the trial the Government contended it had no lease (R. 485-487).

In spite of the fact that the Petty Motor Company had a lease the Government objected to evidence on its

behalf (R. 470-471), and has likewise appealed from the judgment in its favor the same as in the other cases. Apparently the Government itself considers the rights of all the tenants to be identical and a written lease no different than any other.

On page 26 the Government cites the case of *United States v. Dunnington*, 146 U. S. 338, as authority for the proposition that the amount which the condemnor must pay cannot be increased by contracts or distribution of ownership of the property among different persons, and its liability is determined as if the property were in a single ownership. If by this the Government means that the value of the separate interests may be disregarded in computing total value, then the *Dunnington* case is not authority for that proposition, nor are any of the others cited on that page. For example, the *Dunnington* case simply said that the Government was not interested on the condemnation of the fee in the distribution of the award to the persons who owned the fee. It was not an increase in the value of the property that was being considered, but the question of proper parties. In *State v. Superior Court*, 80 Wash. 417, 141 Pac. 906, the question of proper parties was also involved. The court also quotes from *Lewis on Eminent Domain* to the effect that it has never been doubted that lessees are entitled to compensation and must be made parties in order to divest their interest, that the duration of the lease is immaterial, and says, "We are satisfied that the object of the law is to save to the owner and those interested the full cash value of the property taken." The same principle was announced in *Silberman v. United States*, 131 Fed. (2d) 715; *Carlock v. United States*, 53 Fed. (2d) 926; *Meadows v. United States*, 144 Fed. (2d) 751; *Kafka v. District Court*, 128 Minn. 432, 151 N. W. 441. In the *Carlock* case the Court said it was not impressed with the contention of the Government that a tenant is not

entitled to consideration or remuneration for improvements which he placed upon the premises. In the *Meadows* case, both the landlord and the tenant offered evidence of the value of their respective rights in the property condemned. There was no attempt made to eliminate the value of the tenant's interest. In the *Kafka* case the Court expressly held that the gross award was ample as to all interests and that any party had a right to appeal.

If by the quotation on page 26 the Government concedes that in determining the value of the interest taken all interests must be considered in fixing the value, then it has no complaint here. It fixed the landlord's value itself, and the jury fixed the tenant's value. There was no overlapping in any instance.

Several of the cases cited on page 26 have nothing to do with the problem before us here. Nor have the cases on page 27, footnote 12, any application under the facts present here.

On pp. 30 and 33 the Government makes the unique argument that the only thing that it has done is to accelerate the removal of the tenants from the premises by a very short period, that by the condemnation it has relieved them of the liability to pay rent or to return to the premises. As well might a bank argue that it has done a borrower no injury by requiring payment of a note before it is due, since it had to be paid eventually anyhow and the borrower is relieved of paying interest and is not indebted any more; or a tortfeasor justify his negligence by saying that the deceased eventually would have died anyway! The short answer is that they didn't have to move at all at the time the Government condemned.

Also, on page 30, the Government apparently argues that the case of *United States v. Chicago B. & Q. R. Co.*, 82

Fed. (2d) 131, certiorari denied 298 U. S. 689, is overruled by the recent case of *United States v. Willow River Co.*, 324 U. S. 499, or if it is not overruled that there is a different rule for railroads than there is for others under the Fifth Amendment. While there may be various methods of determining just compensation, there is no exception so far as we know favoring railroads or any other classes. Always the factor is the same—just compensation. The *Willow River* case, as we read it, instead of overruling the *Chicago B. & Q. R.* case, approves the principles announced in that case. In the *Willow River* case this Court says: "But damage alone gives courts no power to require compensation where there is not an actual taking of property." It would follow that where there is an actual taking of property, damage in connection therewith is recoverable. This principle has been announced by this Court in numerous cases, as we have already indicated. The *Willow River* case simply holds that no one has a right to have a navigable stream remain at a certain level. There was no damage to any of the property of the company, and the company had no right because of its riparian ownership to have the water remain at the ordinary high water level.

The Government cites the case of *United States v. 150.29 Acres of Land*, 148 Fed. (2d) 33, certiorari denied *Eline's Inc. v. Gaylord Container Corp.*, Oct. Term, 1944, Nos. 1302-3 (pp. 24, 41). In that case the Government condemned the entire lease term, and yet evidence of moving costs was admitted and approved.

GOVERNMENT'S ARGUMENT II.

We have discussed heretofore the right of a month-to-month tenant to compensation upon condemnation of his tenancy.

Some of the Government's cases repudiate its former theory that only the landlord need be considered. In three

of the cases (*United States v. Inlots*, 26 Fed. Case No. 15441A, Page 492; *Meadows v. United States*, 144 Fed. (2d), 751, and *Silberman v. United States*, 131 Fed. (2d), 715), all the interests were considered together in fixing total values, and though the tenant was not heard in the *Silberman* case, he was in each of the other cases, and his values were fixed separate and apart from the landlord's. This is contrary to the Government's contention below and now apparently abandoned here, that the landlord's estate must be apportioned among the tenants. The holding as above indicated in the *Inlots* case was approved by this Court on appeal in *Kohl v. United States*, *supra*.

The Government informs us that the questions presented are of large importance to the Government in its acquisition and use of property for war purposes; calls attention of this Court to the fact that the temporary use of a large number of buildings has been taken, and obliquely insinuates that allowing compensation in our cases would be dangerous and expensive because application of the view of the court below would produce similar results in numerous other cases. In the Circuit Court, the Government was more direct. It came right out and said that, "The resulting increase in the costliness of military acquisitions staggers the imagination." This is but another way of saying that because the property is needed for war purposes, the Fifth Amendment should be disregarded, as otherwise the costs would be staggering. This Court has already answered that argument as has Congress itself in the Act under which these proceedings were brought.

"The war or the conditions which followed it did not suspend or affect these provisions." (Fifth Amendment). *United States v. New River Collieries*, *supra*. Congress gave the Government the right to pursue such remedy as it might elect, "by purchase, donation, or other means of transfer," or "to acquire by condemnation." And as we

have shown, when the Government elects to proceed by condemnation, it not only is foreclosed to deny that the property condemned has a value, but it knows, as did Congress, that this Court has held that the right of eminent domain is inseparably connected with the obligation to pay just compensation. The Government originated these proceedings. It chose the method it would follow. It selected its remedy. We had nothing to do with it. If the Government chose to go around the country evicting people under the power of condemnation, it having selected that method of procedure, knew it would be required, and must be held to pay just compensation. It has at no time made any effort to negotiate with us or to consult us. All of this costly litigation could have been avoided by simple negotiation and no time would have been lost either in occupying our property or in consuming the time of three separate courts. We did not choose route we have traveled. It was forced upon us by the Government. It is no plea that the exigencies of war required the procedure adopted herein. Nor is it any plea that it is unjust to allow us the meager \$10,000.00 we were allowed. The Government didn't proceed to occupy our property for war purposes forthwith. It spent several months in wrecking the interior of the building at an expenditure of ten times more than the jury allowed us, and then abandoned the whole enterprise for the purpose it was condemned. Neither the war nor any requirements thereof compelled the Government to take the course it followed in our cases. The Government should be required to recognize that in war as in peace it should know in advance where it is going and why it is proceeding, and if the necessities of war required confiscation of property, then, as this Court has said, this country does not require one citizen to suffer in order that the entire public may gain by his loss. Under our Constitution the individual loss is

distributed among all the people and is another one of the burdens of war.

In line with the Government's argument that the tremendous costs of war should relieve it of paying for this property, the Government would be justified in confiscating the product of an ammunition plant, an airplane factory, or any other property needed in war. Certainly it could not be heard to say here or any place else that it would be excused from paying because, "The questions presented are of large importance to the Government in its acquisition and use of property for war purposes."

Representatives of the United States must recognize and realize that they do not possess the power of confiscation, and that in acting as representatives of the Government they are not above the Constitution. More than sixty years ago this Court declared, "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171, 182.

In answering the attempt there as here to confiscate the property of private citizens without compensation, this Court said, "If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other Government which has a just claim to well-regulated liberty and the protection of personal rights."

CONCLUSION

No rule for the determining of "just compensation" was violated herein. The verdicts of the jury are less than they should have been and do not include items to which the Government objected. The court's instructions favored the

Government. No substantial rights of the Government have been affected by the judgments herein, nor is it in any position to complain here. Our private property was taken for public use by the United States under the power of eminent domain. Having chosen to proceed against us under the power of eminent domain, the Government cannot escape liability by contending that there was no taking or that what it took under that power was not property. The very fact that the Government used the power of eminent domain establishes that there was a taking and that what it took was property. For this property just compensation must be paid. The Government has not shown wherein any verdict is unfair as a matter of "justice and equity." The cases should be affirmed.

Respectfully submitted,

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Nos. 77-83

DEC 3 1945

CHARLES ELMORE GROPLEY
CLERK**In the Supreme Court of the United States**

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

PETTY MOTOR COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

MERRILL J. BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL
COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. GRIMSDALL, DOING BUSINESS AS GROCER PRINTING
COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES F. WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE SHAFT
COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

INDEPENDENT PNEUMATIC TOOL COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

THE GALIGHER COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

GRAY-CANNON LUMIER COMPANY

**ON WRITS OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT****BRIEF OF ZELLERBACH PAPER COMPANY (a Corporation),
AS AMICUS CURIAE, ON BEHALF OF RESPONDENTS.**

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v.

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UNITED STATES OF AMERICA, PETITIONER

v.

GRAY-CANNON LUMBER COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF ZELLERBACH PAPER COMPANY (a Corporation),
AS AMICUS CURIAE, ON BEHALF OF RESPONDENTS.

STATEMENT OF INTEREST OF AMICUS CURIAE.

Zellerbach Paper Company, a corporation, respectfully requests permission to file this brief as *amicus curiae* on behalf of the respondents herein.

Zellerbach Paper Company is a wholesaler, dealing in various kinds of merchandise. It owns a warehouse located in Los Angeles, California. This warehouse was formerly used in its business and was specially designed and equipped for the purpose. The property is now and has been in the possession of the United States of America, since December 9, 1942. Possession of this property was taken pursuant to the provisions of Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177c, 199, sec. 201, 50 U.S.C. App. Supp. III, sec. 632. The United States has not taken a fee in this property but only the temporary use thereof, for a term of years renewable at its option.

At the time the order of possession was signed and filed, there was stored in the warehouse a very large amount of merchandise, having a value of many hundreds of thousands of dollars. The period allowed for vacating the warehouse was extremely limited and, therefore, it was not possible to sell and move the merchandise in the normal course of business. This fact made it necessary to find, and in great haste, a place in which to store this merchandise against its future sale in the ordinary course of business. There was then a great scarcity of warehouse space in Los Angeles, and the time allowed for moving was so short that it became impossible to bargain in the usual manner for such space; therefore the available space had

to be taken on the terms imposed by those who had such space for sale or rent. In addition, the same time limitation made it necessary to expend extraordinary and unusual amounts in moving this merchandise.

There is now pending in the District Court of the United States, in and for the Southern District of California, Central Division, an action entitled "*United States of America, plaintiff, v. 635 acres of land, more or less, etc., Zellerbach Paper Company, a Corporation, et al., defendants*", No. 3132-H Civil in the records and files of said District Court. In this action, there will be determined in the first instance, the "just compensation" to be awarded to Zellerbach Paper Company, for the taking of its warehouse.

Although the case of *United States v. General Motors Corporation*, 323 U. S. 373, 89 L. Ed. Ad. O. P. No. 6,379, settled the questions of law which would arise in the above named action, nevertheless, Zellerbach Paper Company deems it necessary to appear herein because it is apparent, upon reading the brief filed on behalf of the United States in this cause, that the United States is attempting herein to have disregarded certain elements which under the doctrine of *United States v. General Motors Corporation* should be considered in determining "just compensation".

This Court in the General Motors decision adjudged that in cases involving similar facts, that is, cases where the owner's entire interest is not taken, certain elements not otherwise pertinent when the entire interest is expropriated are to be considered in measuring the "just compensation" to be awarded. This

Court has held that under similar circumstances the following elements, among others, may be considered in awarding "just compensation":

1. The reasonable cost of moving;
2. The storage of goods against their sale; or
3. The cost of their return to the premises.

The United States contends herein, notwithstanding the opinion in the *General Motors* case, that an owner or tenant whose entire interest in real property is not taken cannot have any other elements than the cost of moving resulting from the taking considered for any purpose. Thus the following is stated in the brief for the United States, at page 17 thereof:

"Even a tenant whose *entire interest is not taken* when the Government condemns property for a temporary term cannot have consequential damages other than moving expense resulting from the taking considered for any purpose." (Italics ours.)

The United States contends herein that it seeks only a reaffirmance of the limitations made in the *General Motors* case.¹ It is evident, however, from the quotation above set forth that the United States does not desire a reaffirmance of the doctrine of the *General Motors* case, but that it seeks to obtain a declaration from this Court that under similar circumstances, the cost to the tenant of storing goods against their sale is not an element of "just compensation" but only "consequential damage". Evidence of the cost of stor-

¹Brief for the Government, p. 33.

ing goods against their sale would include proof of the availability in the market of property similar to that taken from the tenant. Therefore, the United States, by characterizing this cost as consequential damage, is not only attempting to limit the application of the *General Motors* case, but is also seeking to rule out, as an element of just compensation, the fair market price of the property taken.

Zellerbach Paper Company contends as do the respondents herein that depending upon the circumstances certain losses may be characterized either as "consequential damages" or as elements to be considered in the award of "just compensation". Zellerbach Paper Company further contends that certain losses and expenses which may be only "consequential damages" when the entire interest in property of a person is condemned, whether this interest be a leasehold or a fee, are ~~elements of "just compensation"~~ when the entire interest is not taken, because in the latter case such losses and expenses are the direct and proximate result of the taking. The United States in this action, as in the *General Motors* case, relying upon decisions arising out of situations where the entire interest of the owner has been taken, is again attempting to "defeat the Fifth Amendment's mandate for just compensation in all condemnations except those in which the contemplated public use requires the taking of the fee simple title".²

²U. S. v. *General Motors Corporation*, 323 U. S. 373 at 381.

JURISDICTION.

The jurisdiction of the Court was invoked by the petitioner, United States of America, under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

OPINIONS BELOW.

The district judge of the United States before whom the case was tried did not write an opinion. The opinion of the Circuit Court of Appeals (R. 621-624) is reported in 147 Fed. (2d) 912.

QUESTIONS PRESENTED.

The United States sets forth in its brief, the following statement of the questions presented:

"1. Whether tenants occupying property condemned by the United States for temporary use for a period longer than the tenants' existing leases are entitled to prove moving costs and consequential damages resulting from the enforced removal as evidence of the value of their interests.

"2. Whether month-to-month tenants are entitled, upon condemnation of the leased property by the United States, to compensation based upon such indefinite period of time as the jury should conclude the tenants might have continued to occupy the property."

We join in respondents' criticism of the Government's presentation of the issues involved and in ad-

dition we contend that there is also involved herein an issue not set forth in the Government's statement of the question but to which it has nevertheless devoted considerable space in its brief. We refer to contentions made by the United States in its brief, pp. 17-23 thereof, under the following heading:

"B. Even a tenant whose entire interest is not taken when the Government condemns property for a temporary term, cannot have consequential damages other than moving expenses resulting from the taking considered for any purpose."

We submit that the use of the term "consequential damages" under the facts outlined in the above quotation, is inaccurate. Under such facts certain losses and expenses suffered and made by the "tenant" are not "consequential damages" but elements to be considered in awarding just compensation.

Therefore, the issue argued by the United States in the portion of its brief above referred to should be stated as follows:

Whether in a proceeding by the United States to acquire the temporary use of business property, necessary expenses, other than moving expenses, incurred by a tenant whose entire interest is not taken constitute an element of "just compensation" within the Fifth Amendment.

STATEMENT OF THE CASE.

We hereby adopt respondents' statement of the case, as set forth in their brief, at pages 4 to 18 thereof.

ARGUMENT.

A. THE FAIR DETERMINATION OF THE MARKET VALUE OF THE PROPERTY CONDEMNED REQUIRES THAT THE AVAILABILITY AND PRICE OF SIMILAR PROPERTY IN THE MARKET BE SUBMITTED TO THE JURY.

The government complains of the fact that, at the trial of the action, "the jury was permitted to consider the increased rents which the tenants paid for their new premises".³ Counsel for the government state, in connection with the foregoing, that this evidence was introduced, "not to show what comparable property was renting for at the time of taking",⁴ but as a loss suffered by the tenant. We find nothing in the references to the record given by the government to justify this statement.⁵ Actually, the testimony was introduced to show the price and scarcity of comparable property in the market.⁶ Such evidence ~~is~~ admissible even in cases where the owner's interest is completely extinguished. It is proper evidence of the increased replacement cost of the property. The government argues at one point that such increased costs are a "business loss" and, therefore, non-compensable consequential damage,⁷ and then immediately proceeds to destroy its argument by stating⁸:

* * * * If the measure of compensation is the market rental value of the property taken, the

³Brief for the Government, page 18.

⁴Brief of the Government, page 18.

⁵An examination of the record shows that the record references given by the Government are limited to pages showing exhibits recapitulating the expenses incurred by the tenants.

⁶Record, pp. 163-166; p. 432.

⁷Brief of the Government, p. 19.

⁸Brief of the Government, p. 21.

inability of the tenant to obtain another location which would, to his satisfaction, meet the requirements of his particular business, without paying a higher price for it or without remodeling or making alterations to fit his needs cannot be considered. While such matters will doubtless affect the price at which [the owner] would have been willing to sell his property, [they] will not affect the price at which he *could* have sold it.' Orgel, *Valuation Under Eminent Domain* (1936), sec. 70, p. 236. *To the extent that the tenant's inability to find suitable quarters is typical of a general difficulty, market value will reflect such embarrassment.*" (Italics last sentence of quotation ours.)

If, as the Government contends, market value will reflect the tenant's inability to find suitable quarters, then the fair determination of the market value of the property would require the submission of this evidence to the jury—otherwise, how might the tenant's "embarrassment" be reflected in "market value"?

This Court has ruled that, when the Government expropriates private property, one of the elements to be taken into account in measuring just compensation is the increased cost, if any, of replacing the property. In *Brooks-Scanlon Corp. v. United States* (1924), 265 U. S. 106, 68 L. Ed. 934,

wherein was involved the requisition by the United States of a steamship, the Government contended that the owner was entitled to recover only the contract or reproduction cost of the vessel. This Court held, nevertheless, that the owner was entitled to recover the dif-

ference between the contract price or production cost of the vessel and the increased cost of replacing it, and to have considered, in the making of the award, the various elements that gave value to the owner's right to have the contract fulfilled and the vessel delivered. This Court, in making its ruling, stated:⁹

"We think it not permissible so to calculate compensation. It is the sum which, considering all the circumstances,—uncertainties of the war and the rest,—probably could have been obtained for an assignment of the contract and claimant's rights thereunder; that is, the sum that would, in all probability, result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy."

And added, quoting at length from *Re Mersey Docks & Admiralty Comrs.* (1920), 3 K. B. 223, the following:¹⁰

"*Re Mersey Docks & Admiralty Comrs.* (1920), 3 K. B. 223, is a case quite similar to this. There, the Admiralty requisitioned a barge nearing completion, altered her construction, and paid, or undertook to pay, the builder the original contract price. *It was impossible for the board, for whom the barge was being constructed, to replace her by another at a cost less than three times the contract price of the original barge.* By agreement, the ascertainment of compensation to be paid by the Admiralty to the board was referred to an arbitrator. The board claimed the difference between the contract price and cost of replacing the barge,

⁹265 U. S. 123-124.

¹⁰265 U. S. 124-125.

regard being had to the fact that replacement would be impossible for three years; and also claimed compensation for loss of services during the period required for replacement. The Admiralty contended that the measure of compensation should be the difference between the contract price and value of the vessel when taken. A special case was stated by the arbitrator. The Earl of Reading, Lord Chief Justice, gave judgment, and held that the board was entitled to recover the difference between the contract price and the increased cost of replacing the barge; that the board was not entitled to any compensation for loss of services, the damage being too remote. He said (p. 233): 'On a broad view of the facts and without undue regard to minute details, the court has to determine upon what principle the compensation to be awarded to the board ought to be measured. In my judgment it is sufficient for the purpose of this case to say that the board are entitled to have the property which, but for the action of the Admiralty, would have been in their possession in April, 1917, replaced by the Admiralty. As, it cannot be replaced except by the expenditure of money, they are entitled to the amount of money which will represent the cost to them of the replacement. That must be measured with regard to the special circumstances arising from the war, and more especially to the increase in the value of labor and materials which has continued up to the present time * * * I can see no very material difference between the respective principles contended for by counsel on behalf of the board and counsel on behalf of the Admiralty. In truth, I think that both these principles lead to the same conclusion.'

"This court has held in many cases that replacement cost is to be considered in the ascertainment of value, but that it is not necessarily the sole measure of our guide to value * * * (Italics ours.)"

The above measure of damages set forth in *Brooks-Scanlon Corp. v. United States*, *supra*, was also applied by this Court in the case of

Standard Oil Co. v. Southern Pacific Co. (1925),
268 U. S. 146, 68 L. Ed. 890.

Accordingly, it is respectfully submitted that the evidence herein under discussion was properly admitted by the trial Court to establish the replacement cost of the property expropriated by the United States—if for no other reason.

B. IN A PROCEEDING TO ASSESS "JUST COMPENSATION", A TENANT OR OWNER WHOSE ENTIRE INTEREST IS NOT TAKEN IS ENTITLED TO PROVE THE EXPENDITURES AND THE LIABILITIES INCURRED TO SECURE PROVISIONAL HOUSING FOR THE PERIOD OF THE TEMPORARY USE AND OCCUPANCY OF THE PROPERTY BY THE UNITED STATES.

In the preceding section of our argument, we have shown that evidence of replacement cost of the property taken is properly admitted, even in cases where the entire interest of the owner has been taken. In the instances where the entire interest of the tenant or owner is not taken, he is entitled to show the cost to him of other space for the storage of his goods.

"Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and sublessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. *And it might also include the storage of goods against their sale or the cost of their return to the leased premises * * **" (Italics ours.)

United States v. General Motors Corp., 323 U. S. 373, 383, 89 L. Ed. 379, 385.

The rule enunciated in the italicized portion of the above quotation is one of necessity, and arises from conditions created by the manner in which the Government has taken temporary use of property. The Government takes the temporary use of property either with an option to renew the original term or with the option to surrender possession prior to the expiration of the original term. The uncertainties thereby occasioned by the Government and existing local conditions force the person whose properties are taken to buy other property or to enter into leases, the term of which may well extend beyond the period of the Government occupancy. When and if the Government surrenders possession of the property, the owner or tenant will find himself with two pieces of property, or with his old property and a liability for cumulative rentals under an unexpired lease.

It is obvious that the artificial and limited rule of "willing seller" and "willing buyer," advocated by the

Government, must be rejected, otherwise confiscation will result; or, if this fiction must, for other reasons, be maintained, a more realistic approach thereto must be taken.

The application of the fiction of "willing buyer" and "willing seller" in condemnation proceedings is subject to criticism even where fee title is taken by the Government or the entire interest of a tenant is expropriated, the reason being that, in actual cases, the willingness of the buyer and of the seller is not finally manifested until the bargain has been consummated, and when this occurs, the degree of reluctance or willingness of the buyer and seller becomes completely immaterial.

In point as to this matter is the following from the "Valuation of Property" by Bonbright:

"In short, we are convinced that the willing-buyer, willing-seller incantation is a great bar to clear thinking in the law, and that it has no more place in legal opinions than it has in the literature of economic theory. In the words of Judge Rose:

:The effort is to find out not what a real buyer and a real seller, under the conditions actually surrounding them, do, but what a purely imaginary buyer will pay a make-believe seller, under conditions which do not exist. You are forced to wonder what would have happened if everything had been different from what it was. It is not easy to guess what will take place in Wonderland, as other people than Lewis Carroll's heroine have found out." (Vol. I, p. 61, McGraw-Hill, 1937.)

¹¹ *McGill v. Commercial Credit Co.* (1917), 243 Fed. 637 at 647.

The unrealistic "market value" measure advanced by the Government may be humorous in an abstract discussion; but its application in an actual case is cynical, and the voice pronouncing the judgment thereunder is new and heretofore unheard in our Courts.

The application of the rule contended for by the Government in the instant case is not just compensation, but confiscation.

If the market-value rule, applicable in normal condemnation proceedings, is to be extended to cases where only temporary use of property is taken, the Courts, in applying the mandate of the Fifth Amendment, must take into account the true circumstances which surround the buyer and the seller. There is no conflict as to these circumstances: The Government takes property for temporary use for an uncertain term. The owner or tenant, if he has goods to store, must find a place for them during such a term. This condition is forced upon him and, as a seller, willing or otherwise, this is a matter which he must, necessarily, take into account; and, by the same token, the Government, as the buyer, if it imposes such onerous and unbusinesslike conditions must be prepared to pay therefor.

We believe that the issue herein discussed was raised by the Government in this most inappropriate case, in an attempt to have disregarded the standards announced by the majority of the Court in the *General Motors* case for the assessment of just compensation in instances where the entire interest of a tenant or owner is not expropriated. We say that this is an

inappropriate case for the purpose because if, as the Government contends, the entire interests of the tenants were taken, then the evidence objected to was admissible for the purpose of showing the replacement costs of the property, and if on the other hand those interests were not extinguished, the evidence was properly admitted to show the removal and storage costs incurred by the tenants. It is apparent from the record and from the admissions contained in the briefs filed herein, that the issues and facts in this cause are much confused, and no doubt the Government seeks to take advantage of this confusion to obtain not a restatement of the principles of the *General Motors* case but an overruling thereof. The Government makes no mention of the concurring opinion of Mr. Justice Douglas in the *General Motors* case but its legal position is nevertheless based thereon. The Government's inaccurate description of the losses suffered by the tenants as consequential damages cannot be based on anything but in statements which appear in said opinion.

Mr. Justice Douglas in his concurring opinion in *United States v. General Motors Corporation, supra*,¹² states that consequential damages should not be considered even under the facts of that case, and he advances, as a reason therefor, that, if such proof is permitted when the property is condemned for a short period, the same offer of proof cannot be refused when the property is taken for a ten-year period.¹³ The answer to this argument is that in such an event, the Court assessing just compensation will take into ac-

¹²323 U. S. 384.

¹³323 U. S. 385.

count whether a ten-year lease constitutes a long-term lease in relation to the property taken; and, moreover, the uncertainties resulting from a taking for a temporary period with options to renew or surrender will not be present; and, under such circumstances, the relevancy or irrelevancy of the proof offered can be properly assayed and a determination can be made as to whether such damages are the direct proximate result of the taking or consequential damages.

Mr. Justice Douglas also speaks of a ninety-nine-year lease.^{13a} This example does not reduce the proposition for which we contend to an absurdity. A ninety-nine-year lease is tantamount to a fee. Under such circumstances, the items here spoken of would indeed be irrelevant and would constitute consequential damages.

Mr. Justice Douglas also states that the rule set forth in the majority opinion in the *General Motors* case "promises swollen verdicts which no Act of Congress can cure".¹⁴ This statement fails to take into account that such "swollen verdicts" will not result from the rule laid down in the majority opinion, but from the perhaps ill-advised action of the persons duly authorized to represent the United States in such matters. It must be remembered that Congress did not choose, in granting the Second War Powers, to conscript property as it had conscripted manpower; but, instead, authorized the Executive Branch of the Government to take any and all kinds of property—for a day, a month, a year, or in perpetuity—upon the pay-

^{13a}323 U. S. 385.

¹⁴323 U. S. 385.

ment of just compensation. If, under the power thus granted, the officers representing the Executive Branch of the Government, elect to take valuable properties in a manner calculated to inflict great loss upon the owners, this Court will no doubt bear in mind when the time comes to assess just compensation that such properties were not conscripted and that, therefore, the award cannot be nominal or merely approximate to the loss, but must be the full equivalent of what has been taken.

The Government attempts to defend its action in taking temporary use of property and to have rejected as non-compensable the losses thereby inflicted on the ground that the policy expressed by Congress required that property be purchased "only when it would be more economical to purchase than lease, if leasing be possible in cases where doubt prevails as to the land desired being permanently needed for military purposes",¹⁵ and in this connection the Government implies that if just compensation is made, this policy will prove anything but economical. This argument completely overlooks the fact that the Constitution will not permit and that Congress has not required that the wisdom of Congressional policy be justified at the expense of owners of property.

The last defense urged in connection with the Government's position in this matter is a plea of confession and avoidance. Counsel for the United States say:

"We do not contend that the guarantees of the Fifth Amendment are any less during war time. (Cf. Br. in Op. p. 11.) But because the exigencies

¹⁵Brief for the Government, p. 32, footnote 16.

of war have made it necessary to acquire much property for public use during a short space of time, the inconveniences and dislocations of property owners resulting from this cause have naturally been greater." (Brief for the Government, p. 33⁵)

It is evident from the foregoing that the war was the remote cause of the losses herein discussed and that Government action was the direct and proximate cause thereof. Accordingly, it is submitted that these damages are not consequential, but result directly and proximately from the manner in which the tenants' properties were taken, and as such are elements of just compensation under the Fifth Amendment.

CONCLUSION.

In conclusion, we contend that because of the foregoing reasons, the judgment of the Court below in favor of the respondents whose property interests were not entirely extinguished should be affirmed on the basis of this Court's decision in *United States v. General Motors Corporation*, and that as to the other respondents the judgments should likewise be affirmed on the basis of the reasons stated in their brief.

Dated, San Francisco, California,
November 30, 1945.

Respectfully submitted,

PHILIP S. EHRLICH,

*Counsel for Zellerbach Paper Company
(a corporation), as Amicus Curiae for
the Respondents.*

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NOS. 77-83

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA

v.

PETTY MOTOR COMPANY

UNITED STATES OF AMERICA

v.

MERRILL J. BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL COMPANY

UNITED STATES OF AMERICA

v.

WILLIAM G. GRIMSDALL, DOING BUSINESS AS GROCER PRINTING COMPANY

UNITED STATES OF AMERICA

v.

CHARLES F. WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE SHAFT COMPANY

UNITED STATES OF AMERICA

v.

INDEPENDENT PNEUMATIC TOOL COMPANY

UNITED STATES OF AMERICA

v.

THE GALIGHIER COMPANY

UNITED STATES OF AMERICA

v.

GRAY-CANNON LUMBER COMPANY

PETITION FOR REHEARING

SHIRLEY P. JONES,
BENJAMIN L. RICH,
GORDON R. STRONG,

Boston Building
Salt Lake City, Utah

Attorneys for Respondents.

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UNITED STATES OF AMERICA

v.

GRAY-CANNON LUMBER COMPANY

PETITION FOR REHEARING

Come now the above named defendants, with the exception of Petty Motor Company and Merrill J. Brockbank, and respectfully petition for rehearing and reconsideration herein upon the following grounds and for the following reasons:

1. The defendants herein were not tenants at will.
2. The defendants' tenancies never have been terminated under or as required by the Utah law pertaining to the termination of tenancies.
3. "Just compensation" should include a consideration of damages directly and proximately caused by the taking of the tenancies.

4. Regardless of any rule with reference to moving costs, these cases should not be reversed.

I.

THE DEFENDANTS HEREIN WERE NOT TENANTS AT WILL.

The opinion herein refers to the tenants as tenants at will (p. 7). Neither at common law nor under the Utah statutes were we tenants at will. At common law a tenancy at will expired at the death of the landlord, upon conveyance of the property, and many authorities hold that no notice to quit was necessary. A tenancy such as ours for an indefinite time with monthly or other periodic rent reserved does not terminate upon the death of the landlord or conveyance of the property, and a notice to quit is an essential requirement. 32 American Jurisprudence, pp. 83-88.

Under the Utah statute, 104-60-3 (2), the only change as to tenants at will from the common law is a definite provision requiring notice of five days to terminate them. The first part of the paragraph deals with tenancies such as ours, and the last part deals with tenancies at will.

These two tenancies have recently been construed by the Utah Supreme Court in cases cited in our former brief: *Buchanan v. Crites*, 106 U. 428, 150 P. (2d) 100, holding that a tenant at will can not be dispossessed even by the landlord without notice; and in *Carstensen v. Hansen* (not yet reported in the Utah Reports), 152 P. (2d) 954, holding that a landlord can not terminate the tenancy of those holding under an indefinite tenancy with monthly rental payments even by giving notice unless he complies strictly with the statute (104-60-6).

We were not tenants at will in any sense of the word,

and attaching to our tenancies the legal implications of tenants at will is wrong.

II.

THE DEFENDANTS' TENANCIES NEVER HAVE BEEN TERMINATED UNDER OR AS REQUIRED BY THE UTAH LAW PERTAINING TO THE TERMINATION OF TENANCIES.

Although for convenience only we have referred to our tenancies as month-to-month tenancies, that does not mean, under Utah law, as we pointed out in our former brief, that we had only a right of occupancy for a monthly period. Under Utah law, 104-60-3(2), our tenancies are specifically defined as tenancies "for an indefinite time with monthly or other periodic rent reserved".

The opinion herein seems to proceed upon the theory that the order to vacate given us by the trial court was the notice required to terminate tenancies by the Utah statute 104-60-6, in this language: "Some tenants of this group will not be entitled to anything, because the notice given them by the order of possession is more than the Utah statutory requirement." That is incorrect. None of the tenants has ever received any notice complying in any respect with the requirements of the Utah statute (*Carstensen v. Hansen*, supra, and 104-60-3(2) and 104-60-6, Utah Code Annotated, 1943). Our tenancies were not terminated under the Utah law regarding tenancies. The day after the action was filed the tenants were ordered to vacate their premises under an order to show cause in a condemnation proceeding. We were evicted by court order at the instance of a stranger to the title. Our tenancies were not terminated by notice from our landlord, and, as correctly stated by the trial court, under Utah law no one with the excep-

tion of the landlord or the successor to his estate may give the notice to terminate the tenancy. The opinion of the Court apparently adopts the argument of the Government that at best we had 15 day tenancies, and the entire discussion apparently proceeds upon this assumption. The fact is that we had the right to remain in our premises indefinitely, subject only to the landlord's right to terminate our occupancy by a proper notice properly given under Utah law. Our tenancies never have been terminated under Utah law, and so far as Utah law is concerned we are still tenants, dispossessed only by the power of eminent domain.

The duration of our tenancies is no mere technical assumption. The proof of the fact is the length of time these tenants occupied the property—as long as 26 years in some instances, not by sufferance, but under a valid existing lease. We are not dealing here with a transitory occupation or a temporary arrangement. These tenancies were substantial, of long standing and with unlimited terms so far as the United States is concerned. The United States took from us the right to remain indefinitely which we had exercised for years under leases recognized and protected by Utah law.

The case of *Emery v. Boston Terminal Company*, 178 Mass. 172, 185, cited by the Court in the footnote at p. 7, has no application here. We are not claiming anything under a theoretical renewal right. In our cases there was no question of renewal. Our tenancies had not expired and were not in danger of expiring. In the *Emery v. Boston* case, the tenancy terminated at a definite period with no legal right of renewal, merely the past custom and supposed intention of the landlord to cover any future term. It was for this non-existent future term damages were claimed. That is not even comparable with our leases.

The whole difficulty in our cases arises from the erroneous assumptions that we were tenants at will, that notice to quit had been given as required by law to terminate tenancies, and that our right of occupancy had a termination period renewable only upon "changeable intentions." None of these assumptions is right. Our tenancies were not unsubstantial, vague or intangible—they were of long duration, permanent, and continuing. All of this is overlooked.

The only way the United States got possession of our property was under the power of eminent domain. Now, to allow us to be dispossessed by that power and then allow us nothing more than token protection upon the theory that the taking itself limits the rights of the tenants, is literally to make the Fifth Amendment a means of confiscation and it in fact becomes "a sword instead of a shield". Whenever the condemnor is permitted to take property under the power of eminent domain and then permitted to escape anything but token payment because his own act in condemning is held to render the property taken of little value, then the Fifth Amendment is used to take the property and avoid payment for it. To say that the order of occupation acts as a landlord's notice to quit does exactly that.

The argument applies with great force also to the Independent Pneumatic Tool situation. Regardless of any provision in the lease concerning its termination, actually and as a matter of fact it was terminated by the condemnation proceedings, and not by the lease provisions. It would be terminated just as effectively had there been no such provision in the lease. So, to allow the condemnor who has terminated the lease to insist that he has not done that which he has done, and avoid payment for what he has taken, is again using the Fifth Amendment as a means of getting

possession of property and also as a means of avoiding payment for it. The lease provision was not made for the benefit of the condemnor and so far as he is concerned should be unavailing. His act ends the tenancy and for that act he should pay. The principle is well established that the doer of an act cannot escape its consequences because the person affected is otherwise protected. Unless confiscation is to result, "just compensation" as to tenancies such as ours which have no fixed term or marketability, must take into consideration the actual damage done by the taking.

III.

"JUST COMPENSATION" SHOULD INCLUDE A CONSIDERATION OF DAMAGES DIRECTLY AND PROXIMATELY CAUSED BY THE TAKING OF THE TENANCIES.

The Court declares that moving and relocation costs are relevant where only part of the term is taken but not when the entire term is taken, and yet states on p. 3, "When the shortening of the term is wholly at the election of the lessee (the United States here), the term of the leasehold for the purpose of determining the extent of taking must be considered to be its longest limit."

Thus in any case, including the General Motors case, if the United States takes the entire remainder of the term and also reserves the right of surrender at any or several prior periods, it takes the entire term and the tenant, including General Motors, can not have moving costs or costs of relocation considered because the entire term is condemned, despite the fact that the Government can terminate its occupancy at any time less than the full term and inflict without liability the same expenses and damages as it would have been liable for had only a yearly lease been

condemned. The same result follows if the period condemned is a shorter period with rights of renewal. Under the Court's opinion in this case, the Government by this method can determine for itself what it will pay. And hereafter it will never condemn for only a part of a term but always for the entire remaining term of the tenant, reserving rights to surrender, and thus actually inflict upon the tenant the wrongs that the General Motors case said would result in confiscation.

On pages 5 and 6 the opinion states, "We think the sounder rule under the federal statutes is to treat the condemnation of all interest in a leasehold like the condemnation of all interests in the fee. In neither situation should evidence of the cost of removal or relocation be admitted. Such costs are apart from the value of the thing taken. They are personal to the lessee. The lessee would have to move at the end of his term unless the lease was renewed. The compensation for the value of his leasehold covers the loss from the premature termination except in the unusual situation where it is a higher cost for present relocation than for a future." If by this statement the court means that the "market value" fiction must be applied to leaseholds which in most instances have no "market value", it would seem to be a repudiation of many prior statements of the Court, that where there is no market, some test other than market value must be used, which prior statements are recognized and approved in the General Motors case itself. One of such tests this Court has used in fixing just compensation is to determine what would be offered by one seeking the lease to one selling it in a fair transaction. Certainly moving and relocation expenses would enter into any fair transaction. These cases were cited in our former brief, but are not mentioned in the opinions. Obviously, there is no market value for the usual lease because

they are not sold on any market and there is no market demand for them. So if the opinion here stands, it means that in many cases leases will be taken without just compensation because no market for them exists. In fee condemnations this court has always allowed the value of improvements placed upon the property by the owner to be considered. Usually they go with the fee and are included in the compensation, whether the condemnor uses them, or not. They may be replaced from the compensation paid. The cost of removal and relocation of fixtures and equipment is but a means of determining their value or their replacement cost as a part of the lease premises. Certainly moving and relocating that which the taking renders useless, unless moved and relocated, is fair to consider in determining just compensation for the taking. Otherwise, the things that give value to the lease are lost because the condemnation makes them useless unless they are set up elsewhere. So applying the rule of fee condemnations is not just because the situation is entirely different.

It cannot be determined how "compensation for the value of his leasehold covers the loss from the premature termination" of the lease unless the damages sustained from such premature termination are to be considered. Those damages consist largely in the cost of moving and relocating. The value of the leasehold interest cannot be determined without taking into consideration its replacement value and cannot cover premature termination if the damages from that premature termination are not competent evidence. That the lessee might be required to move anyway at some future date (in our cases never so far as the United States is concerned) should not be considered, because it is the present condition that is relevant, not a future contingency, not even remotely prospective.

On page 6 the opinion says that the reason for allowing moving costs where only part of a lease is taken is because the lessee must return to the leasehold at the termination of the Government's use, citing the General Motors case. That is not the law in many states. Many states follow the rule that condemnation, whether partial or complete, voids the lease. This we pointed out in our former brief at pages 84 and 85 in discussing why termination clauses upon condemnation were placed in leases. The reason, therefor, given by the opinion for the allowance of evidence of moving costs in partial taking of a tenancy and not allowing such evidence in taking the entire tenancy, does not apply in many jurisdictions which control the property rights of the parties. As a matter of fact the loss and damage to the tenant is the same in both instances and its allowance in one case and rejection in the other is not just.

It seems to us that the difficulty arises from considering moving costs and costs of relocation "personal costs" or "consequential damages" where tenancies are concerned. With all due respect, we can not see that they have any elements justifying their classification as either personal or consequential. They are the direct, proximate, necessary, unavoidable result of the taking. They can be fixed, measured and determined exactly and accurately. They are caused by the condemnor and inflicted upon the condemnee, and would be taken into consideration by any fair minded person who desired to have the tenant move in order that he might occupy his premises. They affect and are a part of the value of the premises and a fair element to be considered. They are not the same as loss of business, loss of profits, good will, and the like, which do have elements of uncertainty and are in some degree intangible. No evi-

dence of such intangibles was received or considered in our cases.

This Court in the opinion here recognizes and in our humble judgment properly that just compensation includes damages, because it uses that word on p. 7 of the opinion as follows: "Upon a new trial, each tenant other than the Independent Pneumatic Tool Company, should be permitted to prove *damages* for the condemnation of its rights for any remainder of its term which exists after its ouster by the order of possession, but not costs of moving or relocation." (Italics added.)

There is no reason we can imagine, except a misapplication of the word "consequential", why damages for moving and relocation should be excluded from other damages allowable. They definitely in practice and as a matter of fact, are a part of the value of the tenancy, and there seems to be no good reason why the law of condemnation should not recognize what are the facts since after all what is just compensation as a matter of fact should be just compensation as a matter of law.

While the opinion permits damages for the remainder of the term which may exist under Utah law, in the next sentence it states that this in some instances will be nothing. Thus it seems to us that the opinion recognizes on the one hand that property has been taken, and then judicially declares that that which is taken need not be paid for. The trial court cannot allow damages under Utah law if it refuses damages to any of the tenants. Under Utah law, the requirement for notice to terminate our tenancies has never been given, regardless of words to the contrary, and condemnation is not a substitute for the requirements of Utah law to terminate tenancies. Now to permit it to be used as a substitute and to deny compensation for the dam-

age caused us, all language to the contrary notwithstanding, is such confiscation as the Fifth Amendment forbids.

There can be no practical objection to allowing evidence of the damage the Government does in dispossessing tenants. It has long been recognized by this Court and everyone else that where all the people take the property of one of the people for the benefit of all, the common requirements of justice and equity insist that the burden fall upon all the people who receive the benefit and not upon the individual who is injured. The argument is obliquely made by the Government that the cost to the Government would be tremendous. It is far better for the Government to pay for what it takes than to allow it to ruin thousands upon thousands of people by confiscating their property. The harm is immeasurably greater by making the individual bear the loss than it is by requiring the entire people to share the burden. And it is only fair and right to do so. To allow the Government to escape payment is to limit the words "just compensation" to less than their ordinary meaning, while to require the Government to pay for the damage it does by the taking is to give "just compensation" only its ordinary meaning. This does not give the words "just compensation" a meaning different than has been given to it by this Court from early times. It does not fix a value special to the owner or the condemnor, but allows to be considered those elements that necessarily would enter into a transaction between private individuals seeking to accomplish that which the condemnor accomplishes by means of condemnation. This Court has long held that "market value", strictly construed frequently cannot be applied, and other elements must be considered in determining "just compensation". But even under the "market value" rule, moving costs and costs of relocation would be considered by private individuals in a fair transaction in fixing the value of a tenancy.

While it is not intended to do so, the opinion now gives the Government the power to confiscate any tenancy it desires—those of indefinite term without paying any compensation, and those of fixed terms by condemning the total term, reserving surrender rights, paying only the rental value of the bare floor-space regardless of the way it has been equipped for the particular uses of the tenants, which equipment adds to and enters into its value in actual fact.

IV.

REGARDLESS OF ANY RULE WITH REFERENCE TO MOVING COSTS, THESE CASES SHOULD NOT BE REVERSED.

The Court on page 2 says: "The Government accepts a separate responsibility to compensate the tenants for any legally recognized interest which they may have in the property." The Court overlooks the fact that the Government made no such concession until it reached this Court. It contended below that it owed the tenants nothing. It refused to deal with them on any terms. It forced this lawsuit on us. And also in this Court, in spite of its acceptance of separate responsibility, the Government still insisted that it owed the tenants nothing. Certainly the trial court should not be reversed because the Government now adopts a position in this Court that it refused to adopt in the trial court. The trial court should not be reversed for rejecting a position which the Government itself now concedes was wrong.

Furthermore, the opinion is in error in stating on page 4 that the trial court permitted evidence "not only as to the value on the market of the use and occupancy, over and above the agreed rent, for any remainder of a term which may have existed in the respective tenants after they were

dispossessed, but also allowed evidence of the expenses incurred in moving and the reinstallation of equipment." The trial court ~~did~~ not do that. The evidence of moving and re-installation was offered only as it has a bearing upon the value of the occupancy, not in *addition* to that value. The trial court time and again expressly told the jury that they were not to allow moving costs and the like, that they were not to give us our costs of relocation and our moving costs, and that the only thing the jury was to consider was, What was the value of our right of occupancy? Even if evidence of moving costs and costs of relocation should not have been admitted, no harm was done, because the jury did not allow them. The jury ignored the evidence of moving costs and the costs of relocation; and in no instance are they included in the jury's verdict. If this Court desires to announce as a rule that actual damages can not be recovered if they are embraced within the terms "moving costs and costs of relocation", it nevertheless should not reverse these cases, because those costs were not allowed in these cases. And at no time did the Government adopt the position, either in the trial court or in the Circuit Court, announced by this Court in its opinion here. These cases should not be reversed, because (1) the Government was concededly wrong below; and (2) the evidence objected to was disregarded by the jury. If this case is to be used as the means of announcing general rules, it can be readily so used without imposing upon us additional hardships and burdens which always we have been powerless to avoid, because of the attitude of the Government itself from the beginning of these cases.

CONCLUSION

The net result of the opinion is that it permits an established business to be destroyed if the owner of the business

has not sufficient capital to reestablish himself. It seems a shocking thing to destroy an established business under the power of eminent domain and then say that nothing has been taken, which can be the result from the application of the opinion here. We have been damaged so seriously by the condemnation of our property that it seems inconceivable to us that we are to be denied any compensation, especially by a definition of just compensation that rejects realities and adopts a rule of narrow interpretation. In making the foregoing observation we are fortified by, and again repeat, this Court's prior declaration, that the right of "just" not unjust compensation is an incident to and inseparably connected with the power of condemnation; that this is a natural equity which commends itself to anyone and in no wise detracts from the power of the public to take, while on the other hand it prevents the public from loading upon one individual more than his just share, and that the Fifth Amendment says that when the individual surrenders to the public "something more and different from that which is exacted from other members of public, a full and just equivalent should be returned to him". This Court has uniformly held that the protections of the Fifth Amendment should be construed liberally: "A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance." If in these present cases the tenants are to be allowed only the bare floor space value of their tenancies, and the order to vacate considered as a substitute for a landlord's notice to quit, then indeed do our rights consist more in sound than in substance, the opinion having announced that some of us can recover nothing and the rest of us being entitled only to the value of the occupancy of a few meager days of a bare floor space, despite the fact that as a direct and proximate result of the taking our business homes have

been destroyed and we have been damaged irreparably. All the foregoing quotations are taken from the Monengahela case, 148 U. S. 312, and have been repeated many times by other decisions of this Court. The present opinion is the first within our knowledge to deny just compensation, because it is obvious that if some of the tenants of the group are entitled to nothing the rest of them are entitled to what amounts to practically the same thing. Regardless of any words to the contrary, our property has been confiscated and destroyed without compensation under the power of eminent domain. Never before has this been permitted in this country.

As the cases stand, we would be far better off if there were no Fifth Amendment. At least we would not have been dragged through three courts and now face the prospect of a fourth useless hearing. And the answer that "we need not go to a fourth hearing unless we want to", illustrates that the Amendment so far as we are concerned may exist "more in sound than in substance". As to us it may truly become both a snare and a delusion.

We therefore conclude with an additional quotation from the Monengahela case as follows: "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." There is nothing wrong or against the public welfare to allow to be taken into consideration in fixing the value of a tenancy, the cost of replacing that which is taken. Just compensation certainly should not be less than the value of the thing destroyed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 77-83.—OCTOBER TERM, 1945.

The United States of America, Petitioner,
77 vs.
Petty Motor Company.

The United States of America, Petitioner,
78 vs.
Merrill J. Brockbank, Doing Business as
Brockbank Apparel Company.

The United States of America, Petitioner,
79 *vs.*
William G. Grimsdell, Doing Business as
Grocer Printing Company.

The United States of America, Petitioner,
80 vs.
Charles F. Wiggs, Doing Business as Chi-
cago Flexible Shaft Company.

The United States of America, Petitioner,
81 vs. .
Independent Pneumatic Tool Company.

The United States of America, Petitioner,
82 vs.
The Galigher Company.

The United States of America, Petitioner,
83 vs.
Gray-Cannon Lumber Company.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[February 25, 1946.]

Mr. Justice REED delivered the opinion of the Court.

This writ of certiorari under Judicial Code § 240 brings here for review certain problems relating to the just compensation for tenants in condemnation proceedings to take their entire leaseholds when the United States had already taken over the lessors' interest in the property which the tenants occupy. Cer-

tiorari was granted to consider the holding of the Circuit Court of Appeals, 147 F. 2d 912, affirming the judgments of the District Court, that evidence by a tenant of the costs of moving and reinstallation of equipment was admissible to establish the value of his leasehold under the rule announced in *United States v. General Motors Corporation*, 323 U. S. 373. As this issue presents an important phase of the law of eminent domain,¹ we granted certiorari. 325 U. S. 848.

These cases arise out of a petition for condemnation of the temporary use for public purposes of a building in Salt Lake City, Utah, filed November 9, 1942, which sought to take the use of the building for the Government through June 30, 1945, with the right of election upon the part of the United States to surrender the premises on June 30, 1943, or June 30, 1944, upon sixty days written notice to the owner.² The owner and tenants were parties defendant. An order for immediate possession was entered on November 11, 1942, subject to authorization to the tenants to continue their occupation of their premises for short periods which varied from six to twenty days.

While the condemnation proceedings were pending the owner of the property made arrangements with the United States which resulted in the dismissal of the action against the owner. There is no claim by the United States that this arrangement released it from liability to the tenants for its taking of their leaseholds. As the value of the use of the totality of property, which was taken, thus lost all meaning, the Government accepts a separate responsibility to compensate the tenants for any legally recognized interest which they may have in the property. See *Duckett & Co. v. United States*, 266 U. S. 149.

Although an earlier surrender might occur by the election of the United States, the estate sought did not necessarily expire until June 30, 1945. Prompt possession was required from the tenants and all of them "were required by the order of possession to vacate" the premises which they occupied within various short periods of which twenty days was the longest. The judgments stated the issue was the amount due the tenants for the taking of

¹ See *United States v. 10,620 Square Feet etc., in Canadian Pacific Bldg.*, 62 F. Supp. 115.

² No one questions the authority of the United States to condemn this temporary interest. Second War Powers Act, 56 Stat. 177, sec. 201. *United States v. General Motors Corporation*, 323 U. S. 373.

their occupancy of their premises and found in dollars the just compensation for the rights taken. These facts, we conclude, resulted in the taking by the United States of the temporary use of the building until June 30, 1945. When the shortening of the term is wholly at the election of the lessee, the term of the leasehold for the purpose of determining the extent of the taking must be considered to be its longest limit.³ All rights of all the tenants, except the Independent Pneumatic Tool Company, which is one of the respondents here, terminated before the end of the Government's lease by the lapse of time or in the case of the Tool Company by a "termination on condemnation" clause. With the exception of the Petty Motor Company and the Independent Pneumatic Tool Company, the tenants were tenants under oral contracts on a month to month basis. This entitled them only to notice of termination fifteen days prior to the end of a rental period. Utah Code Ann. (1943), Title 104-60-3(2). The Petty Motor Company held a lease which expired October 31, 1943, with an option for an additional year. Consequently its rights under its lease ended before those which the Government sought by its petition.

The lease of the Independent Pneumatic Tool Company included a clause for its termination on the Federal Government's entry into possession of the leased property for public use.⁴ The events connected with the Government's entry just set out appear to meet the requirements for termination. This does not seem to be controverted. The contention of the Tool Company, as we understand it, is that the tenant is barred from claiming "any

³ In *United States v. General Motors Corporation*, 323 U. S. 373, note 3, a different situation existed. While the estate there sought did not necessarily expire during the existing national emergency, the order for possession, the verdict and the judgment was for that part of the leasehold interest in the property extending from June 19, 1942, to June 30, 1943. We said: "The case now presented involves only the original taking for one year. If, on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded."

⁴ The clause reads as follows:

"If the whole or any part of the demised premises shall be taken by Federal, State, county, city, or other authority for public use, or under any statute, or by right of eminent domain, then when possession shall be taken thereunder of said premises, or any part thereof, the term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease."

of the award of the landlord" but that the condemnor is not relieved of liability to the lessee. This position seems inconsistent. If the Tool Company, with its termination on condemnation clause, was the only tenant and condemnation of all interests in the property was decreed, the landlord would take the entire compensation because the lessee would have no rights against the fund. There would appear to be no greater right where the landlord has been otherwise satisfied. Condemnation proceedings are in rem, *Duckett & Co. v. United States*, 266 U. S. 149; *United States v. Dunnington*, 146 U. S. 338, 350-54, and compensation is made for the value of the rights which are taken. *United States v. General Motors Corporation*, 323 U. S. 373, 379. The Tool Company had contracted away any rights that it might otherwise have had. We are dealing here with a clause for automatic termination of the lease on a taking of property for public use by governmental authority. With this type of clause, at least in the absence of a contrary state rule, the tenant has no right which persists beyond the taking and can be entitled to nothing.⁵

In order to inform the jury as to the value of the tenants' interests where there was a right to continue the occupation of their respective premises, the trial court permitted the introduction of evidence, over the Government's objections, not only as to the value on the market of the use and occupancy, over and above the agreed rent, for any remainder of a term which may have existed in the respective tenants after they were dispossessed, but also allowed evidence of the expenses incurred in moving and the reinstallation of equipment. The trial court's instructions made clear that the evidence was submitted to the jury not for a finding on the cost to the tenants of relocating their businesses but as an element in determining the "value" of their tenancies for that portion of their term which was left upon the termination of the lease. The admission of the evidence and its submission to the jury was approved by the Circuit Court of Appeals on the theory that consideration of such elements of cost

⁵ See *United States v. 10,620 Square Feet, etc., in Canadian Pacific Bldg.*, 62 F. Supp. 115; *United States v. 8286 Sq. Ft. of Space, etc.*, 61 F. Supp. 737, 740-43; *United States v. 21,815 Square Feet of Land, etc.*, 59 F. Supp. 219; *United States v. 3.5 Acres of Land, etc.*, 57 F. Supp. 548; *United States v. Improved Premises, etc.*, 54 F. Supp. 469, 472; *Goodyear Shoe Machinery Co. v. Boston Terminal Co.*, 176 Mass. 115. Cf. *United States v. Entire Fifth Floor in Butterick Bldg.*, 54 F. Supp. 258.

was compelled by the *General Motors* case. 323 U. S. 373. The Court of Appeals recognized that here the Government took the entire term of all the lessees except the Tool Company and possibly the Petty Motor Company but was of the opinion that the principles of the *General Motors* case applied when any leasehold was taken. 147 F. 2d 912, 914. In so holding, the Court of Appeals was in error.

The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called "market value." It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since "market value" does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings. *Mitchell v. United States*, 267 U. S. 341, 344; *U. S. ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 281; *Potomac Electric Power Co. v. United States*, 85 F. 2d 243; Orgel, Valuation under Eminent Domain, chap. V. For the purposes of these cases, it is immaterial whether the Government actually took the leaseholds of the tenants in addition to taking the temporary use of the fee or only destroyed the tenants' right of occupancy. If any property is taken, compensation is required. Cf. *United States v. Welch*, 217 U. S. 333.

There was a complete taking of the entire interest of the tenants in the property. It has been urged that to measure just compensation for the taking of a leasehold by its value on the market or by the difference between a fair rental as of the time of taking and the agreed rent, is unfair. It is said the unfairness comes from the fact that there is really no market for leaseholds; that their value is something peculiarly personal to the lessee.⁶ The same thing is true as to incidental and consequential damages to the owner of a fee. We think the sounder rule under the federal statutes is to treat the condemnation of all interests in a leasehold like the condemnation of all interests in the fee. In

⁶ See *West Side Elevated R. R. Co. v. Siegel*, 161 Ill. 638; *McMillin Printing Co. v. Railroad Co.*, 216 Pa. 504.

neither situation should evidence of the cost of removal or relocation be admitted. Such costs are apart from the value of the thing taken. They are personal to the lessee.⁷ The lessee would have to move at the end of his term unless the lease was renewed. The compensation for the value of his leasehold covers the loss from the premature termination except in the unusual situation where there is a higher cost for present relocation than for a future.

United States v. General Motors Corporation was a different case. In it only a portion of the lease was taken. We there said, p. 382:

"When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress."

There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease, which is not taken, rests upon the lessee. This was brought out in the *General Motors* decision.⁸ Because of that continuing obligation in all takings of temporary occupancy of

⁷ Compare *United States v. Improved Premises, etc.*, 54 F. Supp. 469, 472; *United States v. Entire Fifth Floor in Butterick Bldg.*, *idem*, 261; *United States v. Certain Parcels of Land, etc.*, *idem*, 562; *Wm. Wrigley, Jr., Co. v. United States*, 75 Ct. Cl. 569; *Thermal Syndicate, Ltd. v. United States*, 81 Ct. Cl. 446, 454.

⁸ 323 U. S. 380, 383:

"The question posed in this case then is, shall a different measure of compensation apply where that which is taken is a right of temporary occupancy of a building equipped for the condemnée's business, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use?"

"Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. And it might also include the storage of goods against their sale or the cost of their return to the leased premises. Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long-term lease."

leaseholds, the value of the rights of the lessees, which are taken may be affected by evidence of the cost of temporary removal.

Upon a new trial, each tenant, other than the Independent Pneumatic Tool Company, should be permitted to prove damages for the condemnation of its rights for any remainder of its term which existed after its ouster by the order of possession but not costs of moving or relocation.⁹ The remainder which may exist will depend upon the Utah law on the requirement for notice to terminate the tenancies at will.¹⁰ Some tenants of this group will not be entitled to anything because the notice given them by the order of possession is more than the Utah statutory requirement. The value of the remainder of the term of the Petty Motor Company's lease includes the value of the right to a renewal for a year, if such right continues under Utah law, as well as the value of the period, ending October 31, 1943. The measure of damages is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew in the lease of Petty, less the agreed rent which the tenant would pay for such use and occupancy.

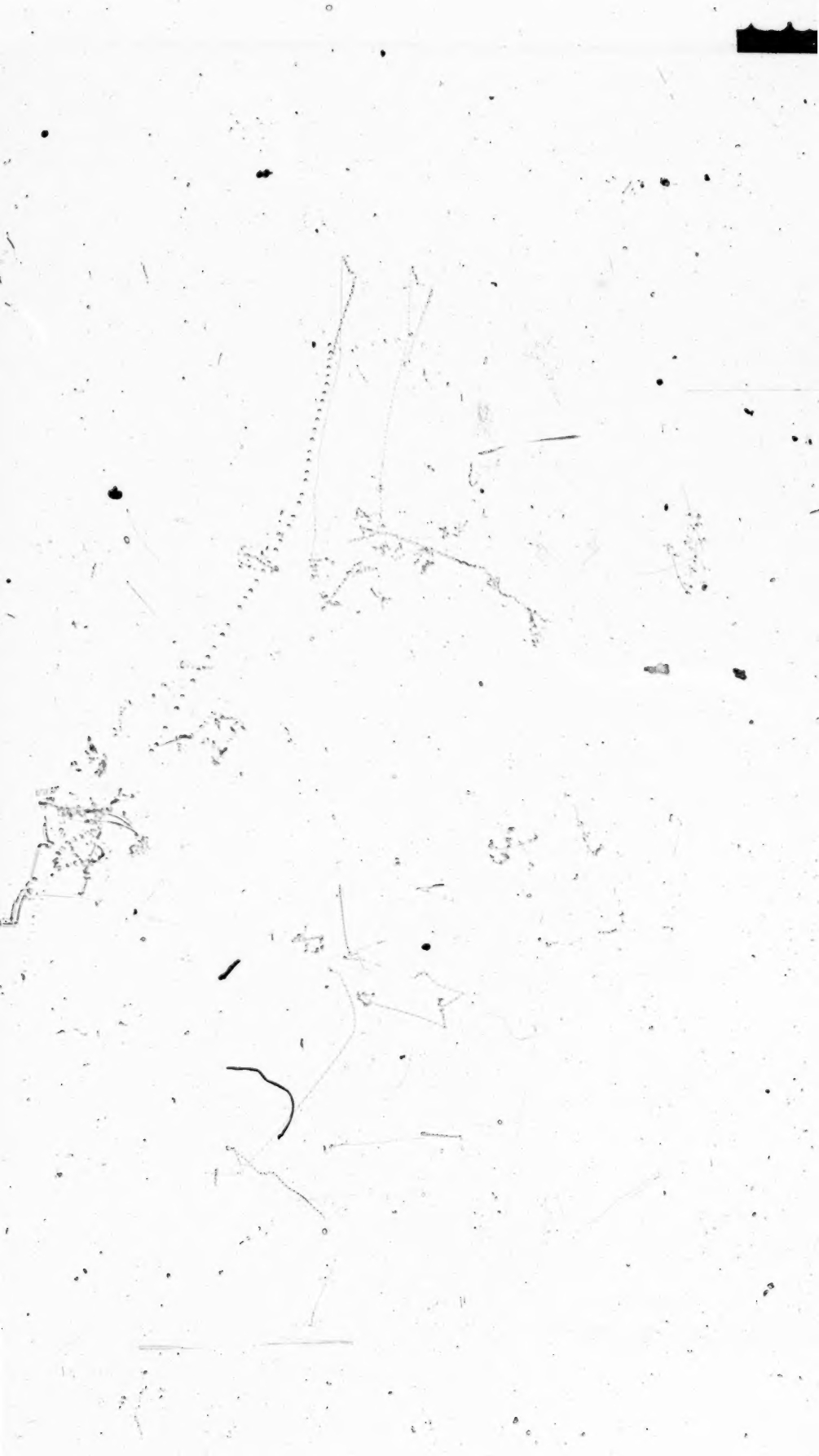
Reversed.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON took no part in the consideration or decision of these cases.

⁹ The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights. *Emery v. Boston Terminal Co.*, 178 Mass. 172, 185:

"It appeared that the owners had been in the habit of renewing the petitioners' lease from time to time, and an attempt was made to give this fact the aspect of an English customary tenant right. The evidence merely showed that the landlords and the tenants were mutually satisfied and were likely to keep on together. It added nothing except by way of corroboration to the testimony that they both intended to keep on. Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right. The court was right in excluding expert evidence as to an increase in value from that source."

¹⁰ U. S. ex rel. T. V. A. v. Powelson, 319 U. S. 266, 279.



SUPREME COURT OF THE UNITED STATES.

Nos. 77-83.—OCTOBER TERM, 1945.

The United States of America, Petitioner,
77 vs.

Petty Motor Company.

The United States of America, Petitioner,
78 vs.

Merrill J. Brockbank, Doing Business as
Brockbank Apparel Company.

The United States of America, Petitioner,
vs.

William G. Grimsbell, Doing Business as
Grocer Printing Company.

The United States of America, Petitioner,
80 vs.

Charles F. Wiggs, Doing Business as Chicago Flexible Shaft Company.

The United States of America, Petitioner,
vs.

Independent Pneumatic Tool Company.

The United States of America, Petitioner.
82 vs.

The Galigher Company.

The United States of America, Petitioner,
83 vs.

Gray-Cannon Lumber Company.

[February 25, 1946.]

Mr. Justice RUTLEDGE, concurring.

I agree with the result and with the Court's opinion, but with an important reservation which I think should be made expressly.

In *United States v. General Motors Corp.*, 323 U. S. 373, the problem was stated as one of first impression, namely, to ascertain the just compensation the Fifth Amendment requires where, under

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power of eminent domain, temporary occupancy of part of a leased building is taken from a tenant holding under a long term lease. The Court distinguished the case from others where the taking is of the owner's entire interest, whether a fee, a term of years or some other interest. Sensing the danger of applying to such a situation the strict rules limiting the amount of compensation in the latter types of cases, the Court said this would open a way for the Government to devise its condemnation, by chopping the owner's interest into bits, taking some and leaving him with others in suspended animation, so that the Amendment's guaranty might become an instrument of confiscation, not one of just compensation for what was taken. Such a procedure, the Court further stated, would be "neither the 'taking' nor the 'just compensation' the Fifth Amendment contemplates." 323 U. S. at 382.

The novelty of such a form of taking, together with the obviously confiscatory consequences, in a practical sense, for the owner, led the Court to hold that the usual measure of just compensation applicable when all the owner's leasehold is condemned, namely, payment of only the long-term rental of an empty building fixed by the terms of his lease or by market value, or less, would not suffice to compensate for carving out of the lease a right of "temporary use." Other elements were required to be taken into account as evidence of the value of what was taken.

These included (1) "what would be the market rental value of such a building on a lease by the long term tenant to the temporary occupier," 323 U. S. at 382, which in addition to the bearing of the long-term rental as one element would include as other elements affecting "certainly and directly . . . the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction," 323 U. S. at 383, (2) the reasonable cost of moving out the property stored on the premises and of preparing the space for occupancy by the subtenant, including the cost of labor, materials and transportation; and possibly also the cost of storage of goods removed against their sale or the cost of their return to the premises. In addition, for fixtures and permanent equipment destroyed or depreciated in value by reason of the taking, the Court held that the tenant whose lease was so cut up was entitled to compensation as for property taken, under the settled rule of cited authorities. 323 U. S. at 383.

Finally, in a footnote the Court pointed out that after judgment the Government had been allowed to amend its petition so as to include in the interest taken a yearly right of renewal, after which the trial court entered a new judgment for the original figure. Stating that these facts were not taken to alter the question presented here, which involved only the original taking for one year, the Court went on expressly to rule: "If, on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded." 323 U. S. at 376, note 3.

Thus the Court applied a rule of compensation to the case of carving out a temporary or short-term use from a longer term very different from that generally applicable when the owner's entire interest is taken. The purpose and the basis for this were to give substance, in practical effect, to the Amendment's explicit mandate for payment of "just compensation" in cases of such extraordinary "takings" and to prevent those words from being whittled down by legalistic construction into means for practical confiscation.

In this case the Court has construed all of the takings as being of the tenant-owners' entire interests. This is clearly the case, on the record, with respect to all except Petty Motor Co. As to it I have doubt but I accept the Court's construction that the Government has condemned its entire leasehold interest in the premises and therefore must pay the full value of that term according to the usual rules in such cases.

My reservation, however, has to do with a possibility this record does not present as an accomplished fact in the case of the Petty Co., but does present as a contingency which might be realized and, in that event, would have a direct and inescapable relation to the ruling concerning the quantum of compensation in the *General Motors* case.

In that case the interest taken was for one year out of a twenty-year term which had six years to run from the time of the original condemnation. There was also added by the later amendment the right of renewal from year to year which, if exercised, might have extended the term taken to the end of the leasehold interest.

In this case a converse sort of taking is presented by the Petty Motor situation. That company held a lease expiring October 31,

1943, with an option for an additional year which if exercised would extend the term to October 31, 1944. The condemnation petition was filed November 9, 1942, when the Petty lease had almost one year to run in any event and two if the option should be exercised. The Government sought to take the use of the building through June 30, 1945, but with the option to surrender the premises on June 30, 1943, or June 30, 1944, on giving sixty days advance notice in writing.

It is this option which I think makes dubious the ruling that all of the Petty Motor Company's interest was "taken". In my opinion it was only "taken" contingently. For, if the option is valid, quite obviously the Government was free to surrender, by giving notice, on June 30, 1943, in which event Petty's lease would have been in force until the following October 31 in any event, or on June 30, 1944, in which case Petty's lease might have continued in force until October 31, 1944. In either event the case would have fallen squarely within the *General Motors* situation and ruling.

In my opinion that ruling and the requirement of paying compensation according to the measure it prescribes applies whether the Government carves out part of the tenant-owner's term by one method of stating what it takes or another. That is, for this purpose, it makes no difference whether the Government "takes" the temporary use for part of the term but adds to this a right of renewal periodically which if exercised will extend the term taken beyond the term of the lease; or, on the other hand, purports to take a term which extends beyond that of the leasehold interest, but reserves the right to cut this down periodically so that in fact it may surrender the premises before the leasehold expires and thus carve out of it a shorter term, just as in the *General Motors* taking.

Whether the chopping up is accomplished one way or the other, the effects for the owner are the same, the "taking" is in substance the same, and the compensation is required, under the *General Motors* decision, to be the same. That ruling cannot be avoided by inverting the length of the term specified and, correlative, the character of the option added. Nor can it be avoided by construing the term taken, in view of the contingent option, in cases of the Petty type as including all of the interest of the lessee, if in fact the Government exercises the option and

surrenders the premises before the lessee's term expires. Upon such a showing the *General Motors* rule would apply and the owner-lessee would be entitled to recover compensation including all of the elements specified in that rule, subject only to making proof of them.

This question I think sufficiently important to be explicitly reserved for decision when a case arises requiring application of the *General Motors* rule to such a situation. I do not understand the Court to rule to the contrary, since there is no showing on this record that the Government has exercised its option. I therefore concur in the decision as it is rendered upon the record which has been presented.